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No. 2441

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

TENABO MINING AND SMELTING COMPANY, a Corporation,

Appellant,

vs.

CHARLES D. BATES,

Appellee.

VOLUME I.

(Pages 1 to 272, Inclusive.)

Upon Appeal from the United States District Court for the District of Nevada.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the Circuit Court of the United States, District of Nevada, Ninth Judicial Circuit.

IN EQUITY.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING AND SMELTING COMPANY, a Corporation,

Defendant.

Bill of Complaint [Filed October 2, 1911].

To the Honorable Judges of the Circuit Court of the United States for the Ninth Judicial Circuit, District of Nevada:

Charles D. Bates, in behalf of himself and all other stockholders of the defendant Tenabo Mining and Smelting Company, who are similarly situated and who wish to join in this bill and bear their proportion of the expenses of this suit and become parties thereto, brings this, his bill of complaint, against the above-named defendant, and for cause of complaint your orator says:

I.

That he is a resident and citizen of the State of Utah, residing at Salt Lake City, in said State; that the defendant Tenabo Mining and Smelting Company, a corporation, is a corporation organized and existing under and pursuant to the laws of the State of Nevada, and is a resident and citizen of said State.

II.

Your orator says that he is now and has been since

the incorporation of the defendant company, a *bona fide* stockholder thereof, owning and holding two hundred shares of its capital stock.

III.

Your orator further says that the subject matter of this suit is of a cash value exceeding two thousand dollars and that this suit is not a collusive one to confer on this court jurisdiction of a case of which it would not otherwise have cognizance. [1*]

IV.

Your orator further says that the defendant was incorporated under the laws of the State of Nevada, on November 14, 1908, for the purpose of acquiring, owning and operating mining claims and mining property, and conducting a general mining business, with a capital stock of three million dollars, divided into one million five hundred thousand shares, of the par value of two dollars each, of which said amount three hundred thousand shares were issued to the Tenabo Consolidated Mines Company and four hundred and fifty thousand shares were issued to the Gem Consolidated Mining Company in payment of the purchase price of the mining claims hereinafter mentioned, and seven hundred and fifty thousand shares were placed in the treasury of the said company as treasury stock thereof.

V.

That immediately after the incorporation of the defendant company and in consideration of the transfer to it of three hundred thousand shares of the capital stock of the defendant company, the Tenabo

*Page number appearing at foot of page of original certified Record.

Consolidated Mines Company conveyed to the defendant the following mining claims, to wit: Two Widows, Two Widows Extension, Copper Hill Group and Nevada Phoenix; and in consideration of the transfer to it as above stated of four hundred and fifty thousand shares of the defendant company, the Gem Consolidated Mining Company transferred to the defendant the mining claims known as Little Gem, Ollie, Reno, and Winnemucca; all of which said mining claims are located in Lander County, Nevada. That at the time of the transfer of the said property from the Gem Consolidated Mining Company the same were incumbered with a mortgage of fifteen thousand dollars.

VI.

That during November and December, 1908, and during the year 1909, the defendant company caused to be sold and disposed of from the treasury of said company, about three hundred thousand shares of its treasury stock, the exact amount thereof being to your orator unknown, for the sum of about twenty-seven thousand dollars, the exact amount of which said sum is to your orator likewise unknown; that the only source of income which the defendant has had has been from the sale of its treasury stock, the [2] said mining claims being undeveloped property and yielding no income whatsoever.

VII.

That in the year 1908, by reason of the failure of the defendant company to pay the mortgage due and owing as hereinabove set forth, the same was foreclosed, but before the sale of the said property under

said foreclosure proceedings, sufficient funds were realized from the sale of treasury stock with which to pay the said mortgage and the accrued interest and expenses thereof, which aggregated approximately twenty thousand dollars, the exact amount being to your orator unknown.

VIII.

Your orator is informed and believes, and therefore alleges the fact to be, that for more than two years last past, the defendant has had no income whatsoever. That it has been totally without funds. That on December 13th, 1910, it was obliged to borrow fifteen hundred dollars from one W. H. Sherman, with which to pay for the assessment work upon the said mining claims, and that to secure the payment of the said money so borrowed, it executed a mortgage to the said Sherman upon all its property and assets, which said mortgage, as your orator is informed and believes, is now due and unpaid; that all the money realized from the sale of the capital stock of the defendant company has been expended in the payment of obligations which were just and due, together with the payment of certain fees and allowances to the officers and board of directors of the defendant company.

IX.

That owing to the undeveloped condition of the property of the defendant and the incumbrance thereon, and the impecunious condition of the defendant, the four hundred and fifty thousand shares of treasury stock yet remaining with the company has no market value and nothing can be realized

thereon; that the assessment work for 1911 has not yet been performed and the defendant company has no money with which to pay for the same. That there are many obligations now due and owing from the defendant company to various creditors, and the defendant is in imminent danger of [3] having instituted a multiplicity of suits against it, and its property and assets dissipated. That the officers and agents of the defendant company have acknowledged openly and repeatedly that it is insolvent. Your orator is informed and believes that said mortgage is about to be foreclosed upon said property, in which event, all of the assets of the said defendant company would be sold for the payment thereof and the unsecured creditors left without resource for the payment of their claims. That the defendant is insolvent.

X.

Your orator further says that the defendant company has never been a going concern in any proper sense thereof, as defined and specified in its articles of incorporation. That from the beginning, the only business that it has transacted was to do the necessary assessment work upon its mining prospects for the years 1909 and 1910, and to attempt to sell its treasury stock and make application of the proceeds therefrom.

XI.

Your orator further says that the present board of directors or those whom they represent by proxy or other appointment hold a majority of the capital stock of the defendant company and have so held said

control since the incorporation thereof. That the affairs of said company have been grossly mismanaged in the following particulars, to wit: That beginning two months after the incorporation of the defendant company, it contracted to and did pay as long as it had funds, to its board of directors and certain other officers and agents, a stipulated monthly salary, notwithstanding the fact that said board of directors and officers and agents performed little or no service for the said defendant company; that in the sale of said three hundred thousand shares of treasury stock, or thereabouts, it paid grossly inadequate commissions either to those who were then upon the board of directors or to others who held large and controlling stock interests in said company; that in making on March 15th, 1910, with one Pepton B. Locker and with one John Janney, the former of whom was a heavy stockholder and the latter of whom was the Secretary of the defendant company, a contract for the sale of all the treasury stock of the defendant company upon a basis that promised to yield to the company no return [4] whatsoever; that in making no provision for the payment of the mortgage now due and owing upon the said property; for making no provision whatsoever for the payment of any of the just obligations due and owing by the defendant, and in keeping no adequate books of account showing the financial transactions of the defendant company.

X.

Your orator further says that owing to the insolvency of the company and the mismanagement

thereof, he has no plain, speedy and adequate remedy at law.

IN CONSIDERATION WHEREOF, and as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant, if it can, show why your orator should not have the relief herein prayed, and make a full disclosure and discovery of all the matters aforesaid according to the best and utmost of its knowledge, information and belief, full, true, correct and perfect answer make to all the matters herein stated and charged, but not under oath, answer under oath being hereby expressly waived, your orator prays:

1. That a receiver be appointed by this Court to take charge of all of the assets of said corporation located within the State of Nevada, including all books, records, papers and documents of every name, nature and description, and sell and dispose of all the property and assets of the said defendant company under the guidance and direction of this Court, and wind up the affairs of the company, and from the proceeds derived from the sale thereof, pay the expenses of said receivership, including a reasonable allowance as solicitors' fees for the bringing of this complaint, and distribute the balance to the stockholders of the defendant as their interests may appear.

2. Your orator further prays for such other and further relief in the premises as may be just and agreeable to equity.

MAY IT PLEASE YOUR HONORS to grant to your orators a writ of subpoena to be directed to the

said defendant Tenabo Mining and Smelting Company, commanding it at a time certain, and under a penalty therein to be limited to personally appear before this Honorable Court, and then and there, full, true, direct and perfect answer make to all and singular the premises; to [5] state, perform and abide by such order, direction and decree as may be made against it in the premises, and shall seem meet and agreeable to equity;

And your orator will ever pray.

J. D. SKEEN,
Solicitor for Complainant.

SHANK & SMITH,
Of Counsel. [6]

State of Utah,
County of Salt Lake,—ss.

Charles D. Bates, being first duly sworn, deposes and says: I am the plaintiff herein. I have read the foregoing complaint, know the contents thereof, and the same is true; excepting that those matters alleged upon information and belief I believe them to be true.

CHARLES D. BATES.

Subscribed and sworn to before me this 30th day of September, 1911.

[Seal] J. McFARLAND,
Notary Public.

My commission expires December 17, 1914.

[Indorsed]: No. 1183. In the Circuit Court of the United States, District of Nevada. Charles D. Bates, Complainant, vs. Tenabo Mining and Smelting Company, a corporation, Defendant. Bill in Equity.

Filed October 2, 1911. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [7]

[Subpoena.]

District of Nevada,—ss.

The President of the United States of America, to Tenabo Mining and Smelting Company, a Corporation, Greeting:

You are hereby commanded that you personally appear before the Judges of our Circuit Court of the United States, Ninth Circuit, District of Nevada, at the courtroom of said court in Carson City, Nevada, on the 6th day of November, 1911, to answer unto a bill of complaint exhibited against you in said court by Charles D. Bates; and to do further and receive whatever said court shall have considered in that behalf; and this you are not to omit under the penalty of Two Hundred and Fifty Dollars.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, and the seal of said Circuit Court hereunto affixed, at Carson City, Nevada, this 2d day of October, 1911, and of the year of our Independence the 136th.

[Seal] Attest: T. J. EDWARDS,
Clerk.
By H. D. Edwards,
Deputy.

J. D. SKEEN,
Solicitor for Complainant.
SHANK & SMITH,
Of Counsel.

MEMORANDUM: The defendant is to enter its appearance in the above-mentioned suit, in the clerk's office at Carson City, Nevada, on or before the day at which the above subpoena is returnable, otherwise the bill may be taken *pro confesso.*

T. J. EDWARDS,
Clerk U. S. Circuit Court, District of Nevada.
By H. D. Edwards,
Deputy.

United States of America,
District of Nevada,—ss.

I hereby certify and return that I served the annexed Subpoena in Equity on the therein named Tenabo Mining and Smelting Co., a corporation, by handing to and leaving a true and correct copy thereof with George Brodigan, Secretary of State of the State of Nevada, personally, at Carson City, in said district, on the third day of October, 1911.

Marshal's fees: 1 service, $4.00.

J. H. HUMPHREYS,
U. S. Marshal.
By R. D. Goode,
Deputy.

[Indorsed]: No. 1183. U. S. Circuit Court, District of Nevada. Charles D. Bates, vs. Tenabo Mining and Smelting Company, a corporation. Subpoena in Equity. Filed October 3, 1911. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [8]

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

IN EQUITY.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,

Defendant.

Answer to Original Bill of Complaint.

The answer of Tenabo Mining & Smelting Company, defendant, to the bill of complaint of Charles D. Bates, complainant:

This defendant now and at all times hereafter saving to itself all and all manner of benefit for advantage, exception or otherwise that can be made to, had or taken to the many errors, uncertainties, imperfections in said bill contained for answer thereto or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering,

1. Denies that this suit is not a collusive one to confer on said Court jurisdiction of an action of which it would not otherwise have cognizance of.

2. Admits that the defendant corporation was incorporated under the laws of the State of Nevada on November 14th, 1908, for the purposes, among others, of acquiring, owning and operating mining claims and mining properties, and conducting a general mining business, with a capital stock of three million

dollars divided into one million five hundred thousand shares of the par value of two dollars each, of which said amount three hundred thousand shares were issued to the Tenabo Consolidated Mines Company and four hundred and fifty thousand shares were issued to the Gem Consolidated Mining Company in payment for the purchase price of its mining claims. Admits that seven hundred and fifty thousand shares of the capital stock of said company were placed in the treasury of said company as treasury stock thereof, and this defendant states that the directors of said company were under the articles of incorporation and by-laws thereof, authorized to sell said treasury stock, or such portion thereof as in the discretion of said board of directors shall deem for the best interests of the corporation for the purpose of creating funds wherewith to transact the [9] business and business affairs of said corporation, and that 167,250 shares of said treasury stock is all of the same that has been sold and that the remaining portion thereof remains in the treasury of said corporation subject to sale.

3. Admits that immediately after the incorporation of said defendant company, the Tenabo Consolidated Mines Company, in consideration of the transfer to it of three hundred thousand shares of the capital stock of the defendant corporation conveyed to said defendant corporation all of its right, title and interest in and to the following named lode mining claims, situate in the Bullion Mining District, Lander County, Nevada, to wit: Two Widows, Two Widows Extension and Copper Hill, and also

all its right, title and interest in and to a certain bond and lease upon the Nevada Phoenix group of mining claims situate in the same mining district and the Gem Consolidated Mining Company, in consideration of four hundred and fifty thousand shares of the capital stock of the defendant corporation, transferred to the defendant corporation all of its right, title and interest in all of the Little Gem lode mining claim and also all of its right, title and interest in and to certain contracts and deeds in escrow for the acquisition of the location title to the Ollie, Reno and Winnemucca lode mining claims situated in the same mining district; but this defendant denies that at the time of said transfer any of said mining claims conveyed by said Gem Consolidated Mining Company other than the Little Gem were encumbered with a mortgage in the sum of fifteen thousand dollars or any other sum whatsoever, and further, this defendant states that in the month of October, 1907, the Reliance Mining & Milling Company, being then the owner of the location title to the said Little Gem lode mining claim, executed and delivered a mortgage upon said mining claim to McCornick & Co. of Salt Lake City, Utah, to secure the payment of a note in the sum of fifteen thousand dollars, executed by Reliance Mining & Milling Company as maker and payable to McCornick & Co. as payee; that thereafter the said Reliance Mining & Milling Company conveyed all of its right, title and interest in and to said mining claim to the Gem Consolidated Mining Company and that in the month of October, 1908, said promissory note not having been

paid, suit was instituted by McCornick & Co. in the Third Judicial District Court of the State [10] of Nevada in and for the County of Lander against the Reliance Mining & Milling Company to foreclose said mortgage and at the time of the transfer by said Gem Consolidated Mining Company of all of its right, title and interest in and to said Little Gem lode mining claim to said defendant corporation, said note had not been paid and said suit for the foreclosure of the mortgage given to secure the said note was then pending and undisposed of in the court in which it had been instituted and said transfer was made by said Gem Consolidated Mining Company and accepted by this defendant corporation subject to the lien of said mortgage.

4. This defendant admits that during the months of November and December, 1908, and during the year 1909 the defendant company caused to be sold and dispose of from the treasury of said company 167,250 shares of its capital stock; but denies that said company during said year or thereafter, or at all, sold and disposed of three hundred thousand shares of its treasury stock or any amount in excess of 167,250 shares, and this defendant admits that for the sale of said shares of treasury stock it realized the sum of $26,687.50. This defendant admits that the only source of income which the defendant has had has been from the sale of its treasury stock, but denies that said mining claims are undeveloped property, but admits that up to the present time the same have yielded no income whatever, but this defendant states that prior to the time when the above de-

scribed mining claims were conveyed by the Tenabo Consolidated Mines Company and the Gem Consolidated Mining Company to this defendant much development work had been done upon the same and large deposits of milling ore had been developed thereon in, to wit: more than seventeen thousand tons of a net value in excess of $171,000.00.

5. Denies that in the year 1908, or at any other time or at all, by reason of the failure of the defendant company to pay the mortgage due and owing as set forth in plaintiff's complaint, the same was foreclosed, but, on the contrary, this defendant states that the proceeding to foreclose said mortgage had been instituted and was pending at the time of the conveyance by the Gem Consolidated Mining Company of the Little Gem, Ollie, Reno and Winnemucca lode mining claims to this defendant corporation, but this defendant admits that before the sale of said property under said [11] foreclosure proceedings and before final hearing upon said proceedings sufficient funds were realized from the sale of treasury stock by said defendant corporation with which to pay the indebtedness secured by said mortgage and to procure a release of said mortgage, but this defendant denies that said indebtedness at the time of the payment thereof exceeded the sum of $19,885.45.

6. This defendant admits that for more than two years last past said defendant has had no income whatever, but denies that it has been without funds. Admits that on December 13, 1910, it was obliged to and did borrow $1,500.00 from one W. H. Shearman with which to pay for the annual assessment

labor performed upon the mining claims owned by it, and that to secure the payment of said money so borrowed it executed a mortgage to the said Shearman upon all of its property and assets except the Copper Hill group, and denies that said mortgage included said Copper Hill group of mining claims; admits that said mortgage is unpaid, but denies that the same is due, and on the contrary this defendant states that the time of the payment of said promissory note for which said mortgage was given as security has been extended by said Shearman, and this defendant states that its assets are of sufficient value to enable it to borrow sums of money far in excess of the amount due upon said promissory note, and in addition thereto all debts due and owing by said defendant with which to liquidate its present indebtedness. This defendant admits that all money realized by it from the sale of its capital stock has been expended in the payment of obligations which were just and due, together with the payment of certain and all fees and allowances to its officers and board of directors, but this defendant alleges that all of said fees and allowances were legal and just claims against said corporation.

7. This defendant denies that owing to the undeveloped condition of the property of the defendant, or to the encumbrances thereon, or to the impecunious condition of the defendant, or by reason of any other matter or thing whatsoever, the number of shares of stock now remaining in the treasury of said corporation has no market value, or that nothing can be realized thereon, but, on the contrary,

this defendant states that said treasury [12] stock is of a value in excess of fifty cents per share, and that said treasury stock and all of the same could have been sold by said defendant and would have been sold by it had it not been for the wrongful acts of this plaintiff as hereinafter alleged.

8. Defendant admits that the assessment labor for the year 1911 has not yet been performed and that the defendant company has no money in its treasury with which to pay the same; but this defendant alleges that it is now making arrangements to and will cause the annual assessment labor for the year 1911 to be commenced in the immediate future and performed as by law required, and that it can and will procure funds through the sale of its treasury stock, or by other legitimate means, wherewith to pay for and liquidate all expenses incurred in the performance of said labor.

9. This defendant denies that there are many or any obligation of said corporation now due and owing by it to various or any creditors, except this defendant states that there are obligations now contracted for which it is liable in the sum of about $8,-297.75, and no more. This defendant denies that it is in imminent or any danger of having instituted a multiplicity or any suits against it or of having its property and assets or any of the same dissipated. Denies that its officers or agents, either with or without authority, acknowledged openly or repeatedly or at all that it was insolvent, and, on the contrary, this defendant alleges that it is not insolvent, and denies that said mortgage is about to be fore-

closed upon said property, and denies that in the event of such foreclosure all or any of the assets of said defendant corporation would be sold for the payment thereof or that the unsecured creditors would be left without recourse for the payment of their claims, but, on the contrary, this defendant alleges that it has sufficient assets with which to pay all of its liabilities, and this defendant denies that it is insolvent or in imminent or any danger of insolvency.

10. This defendant denies that it has never been a going concern in any proper sense thereof as defined and specified in its articles of incorporation, and, on the contrary, alleges that it has transacted such [13] business as it deemed proper and to the best interests of said corporation and its stockholders, and that any delay or interruption in the transaction of its business affairs has been caused through the wrongful acts of said plaintiff as hereinafter set forth, and this defendant denies that from its beginning the only business that it was transacting was to do the necessary assessment work upon its mining prospects for the years 1909 and 1910 and to attempt to sell its treasury stock and make application of the proceeds thereon, but, on the contrary, this defendant alleges that it has transacted all business which its board of directors deemed for the best interests of itself and its stockholders.

11. This defendant admits that the members of the present board of directors, together with those whom they represent as proxy for the purpose of voting

at the annual stockholders' meeting or adjournments thereof, hold a majority of the capital stock of the defendant company, but denies that they have held such control since the incorporation thereof or for any purpose except for the annual stockholders' meeting provided to be held in the year 1911 and the adjournments thereof. And this defendant denies that the affairs of said company, or any of the same, have been grossly or at all mismanaged, in that beginning two months after the incorporation of said company it contracted to and did pay so long as it had funds to its directors or certain other officers or agents a stipulated monthly salary, notwithstanding the fact that said board of directors, officers and agents performed little or no service for said defendant company, or in that in the sale of said 300,000 shares of the treasury stock as alleged in plaintiffs' complaint or any of the same, it paid grossly or any inadequate commissions either to those who were then upon the board of directors or to others who held large or controlling interests in said company, or in that in making on March 15, 1910, with one Peyton B. Locker or with one John Janney a contract for the sale of all of the treasury stock of said defendant company, or that in that making no provision for the payment of the mortgage alleged by said plaintiff to be due and owing upon said property, or in that having made no provision whatever for the payment of any of the just obligations due and owing by said defendant as alleged [14] in said plaintiff's complaint and not keeping adequate books of account showing the financial transactions of the

defendant company as alleged in plaintiff's complaint, but, on the contrary, this defendant states that all monthly salaries paid by it to its board of directors and other officers and agents were paid and received in pursuance of resolutions of its board of directors theretofore duly adopted at meetings thereof duly called and held, and that each and every of said payments were made for services actually performed by the parties to whom the same were paid; and denies that said payments or any of the same were made for little or no service performed by the parties to whom the same were paid; and this defendant further states that said payments and each of them were made by officers and directors of this corporation who have ceased to be such for more than one year last past, and none of the present officers or directors of said corporation participated either in the making of such payments or in the receipt thereof, except that the present board of directors have caused to be made a payment of $200.00 to John Janney, the present Secretary of said corporation, to apply upon account for services performed by him as secretary of said corporation. And this defendant further states that all of its treasury stock heretofore sold has realized to this corporation in cash all that its said stock was reasonably worth to this corporation at the time of the contracting for the sale hereof, and that none of the parties selling any of the same have on behalf of this corporation received grossly or inadequate commissions for the sale thereof, and that none of said commissions were ever paid to members of its board of directors or

officers or to any other party or parties who held controlling stock interests in said company, or in any way dominated its business affairs or its board of directors.

12. This defendant further states that in the month of March, 1910, Peyton B. Locker was a stockholder in said defendant corporation to the amount of 61,618 shares and no more, so far as shown by the books of this defendant, and this defendant has no knowledge as to whether or not said Peyton B. Locker at said time owned any other or further shares of stock and therefore denies the same, and this defendant admits that the said John Janney was at the date of the execution of said contract by it to the said Peyton B. Locker, the secretary of said defendant, and admits that it entered into a contract with the said Peyton B. Locker in the [15] month of March, 1910, for the sale of certain of its treasury stock, but denies that said contract was for the sale of all its treasury stock or any amount thereof in excess of 450,000 shares, and denies that the sale of said treasury stock under said contract promised to yield to the company no returns whatever, but, on the contrary, defendant alleges that said contract, if performed according to its terms of necessity, would have furnished to said defendant the reasonable value of the stock which it contracted to sell, and this defendant states that said contract was in writing, a copy thereof being hereto attached, marked Exhibit I and made a part of this answer. This defendant admits that it has not procured funds wherewith to pay the promissory note secured by the mortgage

given to the said W. H. Shearman, but alleges that it has sufficient assets wherewith to procure funds with which to liquidate said indebtedness in the event it fails to sell sufficient of its treasury stock for that purpose before demand is made for the payment of said promissory note, and this defendant further states that had it not been for the wrongful acts of said plaintiff as hereinafter related, said defendant would have procured from the sale of its treasury stock a sum of money far in excess of that needed for the payment of said mortgage, as well also as for the payment of all other just obligations due and owing or to become due and owing by it, and this defendant denies that it has not kept adequate books of account showing the financial transactions of said defendant company, but, on the contrary this defendant states that it has kept all such books of account as its officers and directors deemed necessary and sufficient for the purpose of keeping informed as to its business transactions.

13. This defendant denies that owing to its insolvency as alleged in said plaintiff's complaint or of its mismanagement, or by reason of any other matter or thing whatsoever, plaintiff has no plain, speedy or adequate remedy at law.

14. And for further answer to plaintiff's complaint, this defendant states that on the 22d day of March, 1910, it entered into a contract in writing with Peyton B. Locker, otherwise known as P. B. Locker, a copy of which is attached to this answer as Exhibit 1; that immediately [16] thereafter the said P. B. Locker entered into an active campaign

for the purpose of selling the treasury stock of this defendant corporation under the provisions of said contract and diligently pursued performance under said contract down to the time when said plaintiff instituted proceedings in this court against this defendant corporation as hereinafter alleged, and in so doing expended large sums of money and procured parties who were able, ready and willing to pay to this corporation the sum of fifty cents per share net for more than 40,000 shares of its said treasury stock, and this defendant is informed and believes, and therefore alleges the fact to be, that said parties are still ready, able and willing to purchase large blocks of said treasury stock at said price when the sale of said stock can be made by this defendant without any question pending in the courts as to the right of said corporation to sell the same under the provisions of said contract Exhibit 1 hereto attached, or as to the solvency of said corporation.

15. That on the 29th day of May, 1911, this plaintiff filed in this court an action wherein he was complainant and this defendant corporation was defendant, a copy of which said complaint is hereto attached, marked Exhibit 2 and made a part of this answer; that said suit continued to pend in said court from the date of its filing to the second day of October, 1911, at which time an order was entered, dismissing said bill of complaint upon the application of said plaintiff; that said defendant believing that the issues presented by said complainant presented a question as to the right of this corporation to sell its treasury stock or any of the same under the

provisions of said contract between this defendant and said P. B. Locker, refused to sell any of its said treasury stock until the issues presented by said bill of complaint were disposed of and the parties procured by the said P. B. Locker under the provisions of his said contract who were able, ready and willing to purchase shares of stock before the filing of said complaint, refused to purchase any of the same until such time as the issues of said complaint were disposed of.

16. That immediately after dismissing said bill of complaint set forth in Exhibit 2 hereto attached, said plaintiff caused to be filed a [17] bill of complaint in this action now pending between plaintiff and defendant, and that by reason of the bringing and prosecution of said suits and not otherwise, this defendant has been unable to sell sufficient of its treasury stock with which to pay its present indebtedness, and this defendant further states that about the time of its incorporation it caused the workings in its said mining properties to be thoroughly examined by mining engineers and a report to be made by them as to the ore reserves and deposits contained in said properties and exposed by the workings thereon, to the end that it might adopt a policy in handling the ore deposits in said properties best calculated to further the interests of said corporation and its stockholders; that said mining engineers recommended that a mill or smelter be erected to treat and reduce the ores contained in said properties and that by so treating and reducing said ores the same could be done at a substantial profit to said

corporation, while said ores could not be shipped to a smelter and the costs and expenses of transportation paid without concentration or reduction at a profit, and upon investigation this defendant discovered that it had large and substantial deposits of ore developed from which substantial profits could be procured by treating and reducing the ores at the property and shipping the concentrates or matte therefrom, but that profit could not be procured from the shipment of said ores in their crude state, and thereupon it decided to sell sufficient of its treasury stock with which to create funds for the construction of a smelting plant or concentrating mill at or near its property for the reduction and treatment of the ores therein contained, and the said contract with the said P. B. Locker, a copy of which is attached to this answer, as Exhibit 1, was entered into by this defendant in an endeavor to sell sufficient of its treasury stock to create the necessary funds with which to construct such smelter or mill, and had it not been for the bringing and prosecution of said suits by said plaintiff as hereinabove set forth, said defendant would have sold sufficient of its treasury stock at the reasonable value thereof with which to have created funds for the construction of said smelter or mill, and this defendant is informed and believes, and therefore alleges the fact to be, that it could now and can in the immediate future sell sufficient of its treasury stock with which to [18] construct and operate a smelter or mill for the reduction of the ores in its said properties when its right under the provisions of said contract

with P. B. Locker to sell said treasury stock is no longer being litigated in court.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by said bill charged, without this, that there is any other matter, cause or thing in said plaintiff's sai*n* bill of complaint contained material or necessary for this defendant to make answer to and not herein or hereby well and sufficiently answered, confessed, traversed, avoided or denied, is true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as *to* this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

TENABO MINING & SMELTING COMPANY.

[Seal] By JOHN JANNEY,
Its Secretary.

H. C. EDWARDS,
Counsel for Defendant. [19]

Exhibit 1 [to Answer—Agreement Dated March 22, 1910, Tenabo Mining & Smelting Co.—P. B. Locker].

THIS AGREEMENT made and executed this 22nd day of March, 1910, by and between Tenabo Mining & Smelting Company, a Nevada corporation, hereafter called the Company, and P. B. Locker of Salt Lake City, Utah, hereinafter called the Agent, witnesseth:

WHEREAS the Company has four hundred and fifty thousand shares of its capital stock remaining in its treasury with which to provide funds for the development and operation of its properties, and the erection of reduction plants, and,

WHEREAS said P. B. Locker is desirous of undertaking the sale of said stock and represents and believes that he can sell a portion of this stock in France or elsewhere, provided the necessary authority be given him to negotiate and execute a contract on behalf of the Company and to list the stock upon a French Banking Market, or other markets;

NOW THEREFORE for and in consideration of the mutual obligations herein imposed and the sum of one dollar interchangeably paid, the said P. B. Locker agrees and undertakes to provide and furnish all the fees and expenses for the listing of each one hundred fifty thousand shares of stock provided for in a Special Power of Attorney set forth in the Minutes of the Company, and all other expenses required by the law of France or elsewhere, and all trustee's fees and expense, and he further agrees at his own expense to go to Paris in the interests of this Company and use diligent effort to negotiate said contract.

In consideration thereof the Company hereby appoints said P. B. Locker its agent and attorney in fact under a special power of attorney hereinafter referred to dispose of four hundred fifty thousand shares of its capital stock now remaining in the treasury, and the Company agrees to duly authorize said P. B. Locker by special power of attorney to

make and execute on behalf of the Company a contract in terms and effect as set out in the said special power of attorney.

The company further agrees that should said P. B. Locker successfully negotiate said contract, it will pay to the said P. B. Locker for his services from the moneys realized from the sale of said stock, but not otherwise, all in excess of the sum of fifty cents per share, said compensation to said Locker being conditional not only upon the negotiation of said contract, but upon the receipt by the Company of the purchase price of said stock.

It is mutually agreed that the entire amount of money received from the sale of said stock shall be deposited to the credit of the Company upon the delivery of certificates of stock.

It is expressly understood and agreed that the Company shall in no way be liable for any fees or expenses for the listing of said stock, or trustee's fees and expenses, or any other expenses whatsoever, and that each and every share of stock so sold shall net the Company fifty cents per share.

From the first money received from the sale of stock, the Company shall pay the said Locker the first fifteen thousand dollars advanced to pay taxes and dues for listing the stock on the French market and the three thousand dollars fees to the Trust Company. The Company shall, however, be reimbursed said amounts from the moneys received from the sales in excess of said amounts before said Locker shall be entitled to any compensation, the intention being that each and every share of stock sold

shall net the company fifty cents per share. Should the sale of stock be not sufficient to net the company fifty cents per share, the said Locker agrees to reimburse the Company in stock out of his personal stock in an amount equal to the amount taken from the treasury and for which the Company has not received fifty cents net per share.

The time allowed said Locker for the carrying out of this contract shall be as follows:

Sixty days within which to furnish satisfactory proof that the Company has entered in contractual relations with reliable persons whereby the sum of $15,000.00 will be furnished to the agent as needed for listing. Then ninety days to effect his negotiations in Paris or [20] elsewhere and procure the execution of a satisfactory contract as set out in said special power of attorney, provided that in computing these periods of time, the months of June, July and August shall be excepted because of the summer season.

Nothing in this contract shall be construed to require the agent to sell any of the said stock in France, but on the contrary he may negotiate the sale of the said stock at any other place or places desired by him.

IN TESTIMONY WHEREOF the Company has caused this contract to be signed by its president and its secretary and its corporate seal to be affixed hereto, and the party of the second part hereto sub-

scribes his signature this 22nd day of March, 1910.

TENABO MINING & SMELTING COMPANY.

By W. MONT FERRY,
President.

JOHN JANNEY,
Secretary.

P. B. LOCKER,
Agent. [21]

[Bill of Complaint, Filed October 16, 1911.]

In the Circuit Court of the United States for the Ninth Circuit, District of Nevada.

CHARLES D. BATES,
Complainant,

vs.

TENABO MINING AND SMELTING COMPANY, a Corporation,
Defendant.

To the Honorable Judges of the Circuit Court of the United States in and for the Ninth Circuit, District of Nevada:

Charles D. Bates, a resident and citizen of the State of Utah, in behalf of himself and all other stockholders of the defendant Tenabo Mining and Smelting Company similarly situated, who wish to join in this bill, bear their proportion of the expenses of this suit, and become parties hereto, brings this, his bill of complaint against the above-named defendant, and for cause of complaint your orator says:

I.

That the complainant Charles D. Bates is a resident and citizen of the State of Utah and is residing at Salt Lake City, Salt Lake County, in said State. That the defendant is a corporation organized under and pursuant to the laws of the State of Nevada, and is a resident and citizen of said State, and complainant is an actual and *bona fide* stockholder of said defendant corporation.

II.

That on and prior to the 21st day of September, 1908, the Gem Consolidated Mining Company was a corporation organized and existing under the laws of the State of Delaware, and was the owner of the Little Gem, Ollie, Reno, and Winnemucca lode mining claims, located and situated in the Bullion Mining District, Lander County, State of Nevada. That said property was clear of all incumbrances, except the paramount title of the United States and a certain mortgage made, executed, and delivered by the said Gem Consolidated [22] Mining Company to one W. S. McCormick, of Salt Lake City, Utah, for the sum of $15,000.00 and accrued interest: that the Little Gem claim had been developed by sinking a shaft or incline to a depth of about 400 feet, and a rich body of ore encountered, but the development of work had not proceeded far enough to ascertain the extent of the ore body. The other claims were undeveloped and of unknown value, except a prospective value by reason of their close proximity to the said Little Gem claim.

III.

That the Tenabo Consolidated Mines Company, a

corporation, was the owner of certain mining claims located in the Bullion Mining District, Lander County, Nevada, and in close proximity to the said claims owned by the Gem Consolidated Mining Company, said claims being known as the Two Widows, Two Widows Extension, the Copper Hill Group, and the Nevada Phoenix, none of which had been developed, and were of no known value, except such as they would have by reason of their being located in a district where valuable minerals were known to exist, and in a vicinity of the said Little Gem mining claim.

IV.

That one Hiram Tyree was president of the Gem Consolidated Mining Company, and was then and during all the times after the incorporation of said company had been, the controlling factor in the business of said corporation, naming its board of directors, and at all times requiring them to submit to his demands with respect to dealing with the property of the said corporation. That large blocks of stock had been sold, the money wasted and squandered, and the said Hiram Tyree had pledged the credit of the corporation for money which he converted to his own use and benefit, and by such continued mismanagement and fraud, all of the available assets of said corporation, including the treasury stock and its credit, had been dissipated and wasted, and the property was mortgaged for all that the said Hiram Tyree and the board of directors operating under him, were able to secure.

V.

That one Peyton B. Locker was the President of the said Tenabo **[23]** Consolidated Mines Company, and was in control of its board of directors; that no mineral of attractive values and quantities had been discovered, and the capital stock of said corporation could not be sold readily upon the market. That the said Hiram Tyree and Peyton B. Locker were both skillful and aggressive stock-brokers and promotors, and in the 21st day of September, 1908, they conspired together to deprive the said Gem Consolidated Mining Company and the said Tenabo Consolidated Mines Company of all of their available assets, for the purpose of securing unfair and fraudulent advantages to themselves and to create a large block of stock which could be sold upon the market to innocent and unsuspecting purchasers; and on that day, with such purposes in view, the said Hiram Tyree and the said Peyton B. Locker, entered into a contract in writing in words and figures as follows, to wit:

"This agreement made and entered into this 21st day of September, A. D. 1908, by and between Hiram Tyree, first party, and P. B. Locker, second party, witnesseth:

The said parties hereto, in consideration of the sum of One Dollar to each of them in hand paid by the other, receipt whereof is hereby acknowledged, mutually agree as follows:

Each of said parties agree that they will together immediately cause to be organized under the laws of the State of Nevada, a corporation to be known

as the Tenabo Mining & Smelting Company, or with such other name as may hereafter be agreed upon, with a capital stock of $3,000.00 divided into 1,500,000 shares of the par value of $2.00 each; said corporation to have a board of directors consisting of five members, and officers consisting of a president, vice-president, secretary and treasurer, with 800,000 shares of the capital stock remaining in the treasury as a working capital, and the other 700,000 shares of the capital stock to be divided as follows: 400,000 shares thereof to be issued to the Gem Consolidated Mining Company, a Delaware corporation, and 300,000 shares thereof to be issued to the Tenabo Consolidated Mines Company, a Nevada corporation; said articles of incorporation, it being understood, to contain the ordinary, usual, and customary provisions, and the said first party agrees immediately upon the organization of said corporation to use his best endeavors to cause to be conveyed to said corporation in consideration of said 400,000 shares of stock so delivered to said Gem Consolidated Mining Company the location to the Gem, Ollie, Reno, Winnemucca lode mining claims, situated in the Bullion Mining District, Lander County, Nevada, free and clear of all encumbrance, except a certain mortgage upon the Gem Claim held by W. S. McCornick for the sum of $15,000 and interest, and the second party agrees immediately upon the organization of said corporation that he will use his best endeavors **[24]** to cause to be conveyed to said corporation in consideration of the 300,000 shares of stock so issued to the Tenabo Consolidated

Mines Company the location title to the Two Widows, Two Widows Extension and to that certain group of mining claims consisting of eight known as the Copper Hill Group, and all the right, title and interest of said Tenabo Consolidated Mines Company in and to a certain lease known as the Nevada Phoenix free and clear of encumbrances, all of said property being situated in said Bullion Mining District, County and State aforesaid.

It is mutually agreed between the parties hereto that in the event of the organization of said corporation that they will each use their best endeavors to to cause said corporation to give an option to W. J. Hilands for the sale of 600,000 shares of its treasury stock for 15 cents per share, and in the event such option is executed, then in the event the parties hereto or either of them procures a contract under said Hilands for the sale of said stock or any of the same that they will divide all commissions made by them equally, each of the parties hereto taking one-half thereof, but each party to bear his own expenses and all sums received as profits from the sale of said stock by either of the parties hereto either directly or indirectly shall be deposited at some bank in New York City to be hereafter agreed upon, and distributed equally by said bank.

It is further agreed that in the event of the organization of said corporation then the said first and second parties will add together all of the stock received by them from or through their respective companies and divide the same equally between themselves.

In Witness Whereof, the parties have hereunto set their hands the day and year first above written.

(Signed) HIRAM TYREE.
P. B. LOCKER."

VI.

That the negotiations between the said Hiram Tyree and Peyton B. Locker were continued, and on the 14th day of November, 1908, they caused the defendant Tenabo Mining and Smelting Company to be incorporated under the laws of the State of Nevada as aforesaid, with a capital of $3,000,000, divided into 1,500,000 shares of the par value of $2.00 each, and with H. P. Clark, Lester D. Freed, R. T. Badger, C. S. Varian and H. C. Edwards as incorporators with 100 shares of stock each, and who constituted the board of directors of said corporation. That in the negotiations, it was agreed that the said Hiram Tyree should have the right to name three of said board and the said Peyton B. Locker should have the right to name two of said board, and accordingly, the said Hiram Tyree named R. T. Badger, C. S. Varian and H. C. Edwards, and the said Peyton B. Locker **[25]** named the said H. P. Clark and Lester D. Freed. That the said Hiram Tyree caused all of the assets of the said Gem Consolidated Mining Company hereinbefore described to be transferred to the said defendant, in consideration of 450,000 shares of its stock, which stock was to be issued in two certificates, one for 50,000 shares and one for 400,000 shares, and the said Peyton B. Locker caused the Tenabo Consolidated Mines Company to transfer all of its assets, consisting of the

mining claims hereinabove described, to the said Tenabo Mining and Smelting Company, in consideration of 300,000 shares of its stock. For the purpose of promoting the sale of the treasury stock of the defendant corporation, and pursuant to the fraudulent contracts and agreements between the said Hiram Tyree and the said Petton B. Locker, they caused the board of directors of the defendant corporation to prescribe as one of the conditions of taking over the property of the said two corporations, that all of the stock issued in consideration of the transfer of the property as aforesaid, which in equity belonged to the stockholders of the said Gem Consolidated Mining Company and the Tenabo Consolidated Mines Company, to be placed in escrow with the Carnegie Trust Company of New York City to be held until the 25th day of November, 1909.

VII.

That said board of directors organized by electing H. P. Clark, President, and R. T. Badger, Secretary and Treasurer, and thereafter and on the 6th day of January, 1909, they passed resolutions allowing each of themselves 2,500 shares of stock for services rendered as directors, and further provided that each of said directors should at any time before the 25th day of November, 1909, have the privilege of purchasing 5,000 shares of the stock at 15 cents per share, and thereafter, on the 7th day of January, 1909, said directors excepting only Lester D. Freed met and passed a resolution allowing the said H. P. Clark, H. C. Edwards and R. T. Badger, the sum of $50.00 per month, as officers of said corporation, and

employing the said C. S. Varian as attorney at a monthly salary of $50.00 per month, which, however, was not to include any retainers or any services rendered in the trial of any cases, and on said day, passed the **[26]** following resolutions, to wit:

"Be it resolved that the said Trust Company" (the Columbia Trust Company) "is hereby authorized to countersign when signed by the President or Vice-President and the Secretary or Assistant Secretary of this Company, an original issue of the capital stock to the number of 1,500,000 shares of the par value of two dollars each.

Be it further resolved that the said Trust Company may apply to and act upon instructions of C. S. Varian, counsel of this corporation, in respect to any legal questions arising in connection with said agency.

Be it further resolved that the Secretary be, and is hereby, instructed to file with the Columbia Trust Company, a certified copy of the foregoing resolution."

"Whereas, negotiations have been pending with brokers of New York City and Boston wherein it appears that a sale of 600,000 shares of the treasury stock of this corporation can be made: and

Whereas, it is the opinion of this board of directors that it is to the best interests of this corporation to grant an option for the sale of 600,000 shares of the treasury stock of this corporation, to P. B. Locker, of Salt Lake City, Utah, with full power to assign to others that he may desire;

Now, therefore, be it resolved that this corpora-

tion do grant an option to the said P. B. Locker or assigns, to purchase 600,000 shares of the treasury stock of this corporation at the price of fifteen cents per share for the first four hundred thousand shares, and twenty cents per share, for the remaining two hundred thousand shares, making a total of one hundred thousand dollars for six hundred thousand shares of the treasury stock, payable as follows:

The sum of $20,000.00 to be paid to this corporation on or before the 10th day of April, 1909, and the further sum of $5,000.00 on the first days of the months of May and June of said year, and the sum of $10,000.00 per month on the first days of July, August and September, and $20,000 per month on the first davs of October and November, 1909, making the full sum of $100,000. Said contract to provide that time is the essence of the same, and in the event said Locker or his assigns fail to make any of said payments as therein provided, then said option will immediately cease and terminate, and the said Locker, or his assigns, to lose all rights to purchase said stock under the provisions of said option, provided, however, that the said Locker, nor his assigns, nor either of them, shall incur any indebtedness or liability of any kind against the company or its property, provided, however, the board may extend time of payments if it so desires, and the President and Secretary of this corporation are authorized and directed to execute immediately, on behalf of this corporation, such contract as will carry this resolution into full

force and effect, the said contract to provide that the said Locker [27] or his assigns, is to cause a market to be made upon the curb of New York and elsewhere as may seem best, giving market quotations of the stock of this corporation, and said contract to provide further that the stock books of this corporation shall be assigned by the President and Secretary and forwarded to the Carnegie Trust Company of New York City, with instructions to deliver treasury stock to the order of said Locker or his assigns, in such amounts as may be called for, upon the payment to the said Carnegie Trust Company of the sum of fifteen cents per share for the first four hundred thousand shares and twenty cents per share for the last two hundred thousand shares of the six hundred thousand shares covered by this option, the same to be placed to the credit of this corporation for its use and benefit."

VIII.

Pursuant to the arrangements theretofore made, the said Hiram Tyree negotiated a loan or sale, the details of which are unknown to your orator, whereby he secured from the sale of 100,000 shares, or on the loan secured by 100,000 shares of the capital stock of defendant corporation, the sum of $35,000.00, and by a series of resolutions which he caused said board of directors to pass, he secured 165,000 shares of said stock for the sum of $25,000.00, retaining for his own individual use and benefit the sum of $10,000.00 in money and 65,000 shares of said stock, as compensation for negotiating said transaction. That the said sum of $25,-

000.00 was paid into the Utah National Bank of Salt Lake City, Utah, of which Bank one W. S. McCornick was President and the Director R. T. Badger was cashier. That such proceedings were had that suit was brought in the District Court for Lander County, Nevada, by the said Director H. C. Edwards, acting as attorney for W. S. McCornick, to whom the said Hiram Tyree was indebted in a large sum of money, to foreclose the mortgage upon the said Little Gem, Ollie, Winnemucca and Reno Claims, and said board of Directors, acting under influence and control of said Hiram Tyree, and for their own advantage and gain, in disregard of the rights of the stockholders of said corporation, paid out the following sums of money, to wit:

P. B. Locker—Equity in sale of 2,250 shares.....		$1,350.00
Taxes 1908—	$152.32	
1909—	81.15	233.47

General Expenses:

C. S. Varian, Telegrams, etc..... ....$	15.55	
V. M. Ramee, Book.....	3.75	
McCornick & Co. Rec. Deeds.....	6.65	[28]
Utah Litho Co. Certificates.	187.50	
Bank of Austin Rec. Deeds	1.00	
Bert Acree, Rec. Deeds..	38.45	

Windsor Trust Company telegrams	2.45	
Ut. Nat. Bank, Telegrams, etc.	14.29	269.64
Legal Fees and Salaries:		
C. S. Price	$50.00	
H. C. Edwards	1,025.45	
C. S. Varian	800.00	
R. T. Badger	650.00	
H. P. Clark	550.00	
Lester D. Freed	550.00	
McCornick & Co. lien fees.	75.00	3,700.45
Property:		
McCornick & Co. Note	$15,000.00	
" " " Interest	3,868.00	18,860.00
Assessment Work:		
George Weston	1001.55	
C. S. Price	110.30	1,111.85
New York Registrar and Transfer Fees		448.60
Balance in Utah National Bank		713.49
Total		$26,687.50

The said Peyton B. Locker sold 2,250 shares of stock of the said corporation and received $1,687.50: that he paid to said corporation, the whole of said sum, and the said board of directors repaid to him as commissions for the sale of said stock, the sum of $1,350.00.

IX.

Your orator is informed and believes, and therefore alleges, that the said Hiram Tyree and the said

Peyton B. Locker and John Janney, the partner of the said Peyton B. Locker, disagreed and quarreled as to the division of the commissions and moneys drawn for the sale of stock, and the said board of directors after paying themselves, as above set forth, out of the moneys received from the sale of said stock, resigned, and on the 5th day of February, 1910, a new board of directors, each holding 100 shares of stock of defendant corporation, and consisting of W. Mont Ferry, Benner X. Smith, E. O. Howard, John Pingree, and John Janney, were elected by the board of directors to fill the vacancies in the board. That said new board qualified and passed a resolution allowing themselves $50.00 per month as compensation for their services as directors, and also employing the firm of Stephens, Smith and Porter to act as attorneys for said corporation. That afterwards, said board paid themselves in accordance **[29]** with the resolution allowing themselves compensation as such directors.

X.

That said Peyton B. Locker and John Janney evolved a scheme for the sale of 450,000 shares of the treasury stock of said corporation, through a system of trustees, registrars, assistant secretaries, and numerous vice-presidents, which scheme was presented to said board of directors, which was at all times agreeable to said Peyton B. Locker and John Janney, and on the 5th day of March, 1910, at meetings of the board of directors held that day, the following resolutions were passed:

"Whereas, this corporation has no funds with which to carry on its development work, to erect the necessary mills and equipment with which to economically treat and handle its ores, and in general to carry on its business: and

Whereas, Mr. Duncan MacVichie, in his report, estimates that a development fund of $20,000 to $25,000 will block out 100,000 tons of ore in the Gem mine, one of the properties belonging to this corporation, which ore is now estimates to have an average of $18.00 per ton; and

Whereas, Mr. MacVichie estimates that $25,000 will supply a one hundred ton daily capacity mill, and that $30,000 will supply a matting plant; and

Whereas, it would appear that $100,000 or thereabouts expended on the Gem mine would put that property on dividend paying basis, and that other money can be spent to advantage is developing the other properties belonging to this company which seem to possess great prospective merit; and

Whereas, there is remaining in the treasury of this corporation, 580,750 shares of stock, 169,250 shares having been sold at the price of fifteen cents per share net to the company; and

Whereas, P. B. Locker has negotiations under way with French Bankers, appearing to promise a practical plan for the sale of the stock of this corporation; and

Whereas, P. B. Locker has offered to undertake the securing of a contract to net the company fifty cents per share for 450,000 shares of stock, or $225,000.00;

Now, therefore, Be it resolved that this company enter into, and that the President and Secretary be and they are hereby authorized and instructed to execute, a contract with the said P. B. Locker in terms and figures following, to wit:

'AGREEMENT:

This agreement, made and executed this —— day of March, 1910, by and between Tenabo Mining and Smelting Company, a Nevada Corporation, hereinafter called the Company, and P. B. Locker, of Salt Lake City, Utah, hereinafter called the Agent, Witnesseth:

Whereas, the Company has 450,000 shares of its capital stock remaining in its treasury, with which to provide funds for the development and operation of its properties and the erection of reduction plants; and

Whereas, said P. B. Locker is desirous of undertaking a sale of said stock and represents and believes he can sell a portion of this stock in France or elsewhere, provided the necessary authority be given him to negotiate and execute a contract on behalf of the company, and to list the stock upon the French Banking Market, or other markets;

Now, Therefore, for and in consideration of the mutual obligations herein imposed and the sum of one dollar interchangeable paid, said P. B. Locker agrees and undertakes to provide and furnish all the fees and expenses for the listing of each 150,000 shares of stock, provided for in a special power of attorney set forth in the minutes of the company, and all other expenses required by the laws of

France or elsewhere, and all trustees' [30] fees and expenses, and he further agrees at his own expense, to go to Paris in the interests of this company and use diligent efforts to negotiate said contract.

In consideration thereof, the Company hereby appoints said P. B. Locker, its agent and attorney in fact, under a special power of attorney hereinafter referred to, to dispose of 450,000 shares of its capital stock now remaining in the treasury, and the company agrees to duly authorize said P. B. Locker by special power of attorney, to make and execute on behalf of the company, a contract in terms and effect as set out in the said special power of attorney.

The company further agrees that should said P. B. Locker successfully negotiate said contract, it will pay to the said P. B. Locker for his services, from the money realized from the sale of said stock but not otherwise, all in excess of the sum of fifty cents per share, said compensation to said Locker being conditional not only upon the negotiation of said contract, but upon the receipt by the company of the purchase price of said stock.

It is mutually agreed that the entire amount of money received from the sale of said stock shall be deposited to the credit of the company upon the delivery of certificates of stock.

It is expressly understood and agreed that the company shall in no way be liable for any fees or expenses for the listing of said stock or trustees' fees and expenses, or any other expenses whatsoever, and that each and every share of stock so sold shall net the company, fifty cents per share.

From the first money received from the sale of stock, the company shall pay the said Locker, the first $15,000.00, advanced to pay taxes and dues for listing the stock on the French Market, and the $3,000.00 fees to the Trust Company. The company shall, however, be reimbursed said amounts from the money received from the sales in excess of said amounts, before said Locker shall be entitled to any compensation, the intention being that each and every share of stock sold, shall net the company fifty cents per share. Should the sale of stock be not sufficient to net the company fifty cents per share, the said Locker agrees to reimburse the company in stock out of his personal stock in an amount equal to the amount taken from the treasury, and for which the company has not received fifty cents net per share.

The time allowed said Locker for the carrying out of this contract, shall be as follows;

Sixty days within which to furnish satisfactory proofs to the company that he has entered into contractual relations with reliable persons whereby the sum of $15,000.00 will be furnished to the agent as needed for listing. Within ninety days, to effect his negotiations in Paris or elsewhere, and procure the execution of satisfactory contract as set out in said special power of attorney, provided that in computing these periods of time, the months of June, July and August shall be excepted, because of the summer season.

Nothing in this contract shall be construed to require the agent to sell any of the said stock in

France, but on the contrary, he may negotiate the sale of the said stock at any other place or places desired by him.

In Testimony Whereof, the company has caused this contract to be signed by its President and its Secretary, and its corporate seal to be affixed hereto, and the party of the second part hereto subscribes his signature, this —— day of March, 1910.

TENABO MINING AND SMELTING COMPANY.

By ————————————,
President.

————————————,
Secretary.

————————————,
Agent.' **[31]**

Whereas, P. B. Locker, has been in negotiations with certain parties in Paris, France, looking to the sale of treasury stock in this corporation and believes that the sale of treasury stock can be effected there through negotiations recently opened up by him; and

Whereas, it appears advisable that this corporation, by the sale of its treasury stock, secure funds for the installation of needed equipment and reduction works, and for the further development of its properties, as well as for carrying on its business affairs in general.

Now, Therefore, be it resolved, that the said P. B. Locker have conferred upon him, authority to execute a contract as hereinafter set out, and that the President and Secretary of this corporation be, and they are hereby, authorized and instructed for and

on behalf of this company, to execute and deliver to the said P. B. Locker, a special power of attorney for the purpose of authorizing him to execute such a contract as follows, namely:

'SPECIAL POWER OF ATTORNEY.

Know All Men By These Presents: That the Tenabo Mining and Smelting Company has made, constituted, and appointed, and by these presents does make, constitute and appoint, Peyton B. Locker, its true and lawful attorney, for this corporation and in its name, place and stead, and for its use and benefit, to execute and deliver a contract in words and figures substantially as follows, to wit:

Between the undersigned, the Tenabo Mining and Smelting Company, a corporation organized under the laws of the State of Nevada, United States of America, with a capital stock of three million dollars, the principal place of business of which is at Salt Lake City in the State of Utah, United States of America. By Mr. Peyton B. Locker, attorney in fact of said company, acting under the powers vested in him by a certain power of attorney authorized and executed in accordance with a resolution of the board of directors of said company adopted at a special meeting held on the 5th day of March, 1910, hereinafter called the vendor, of the one part and ————, hereinafter called the bankers, of the other part, it has been arranged and agreed as follows:

The Tenabo Mining and Smelting Company, being desirous of placing 450,000 shares of its capital stock in Europe, of a nominal value of two dollars, and the Bankers, after having examined the papers of the

said company and the reports of the engineers, agree to lend their support, and the following arrangements have been made between the parties:

Article One: The Vendor agrees to apply through the bankers, to the Ministers of Finances, and to the Administration for the Registration of Property and Stamp in Paris for the compound duty on the shares, and to furnish all necessary documents required by the laws of the French Republic. It further agrees to supply all documents necessary for the publication prescribed by the laws in the Official Journal of the French Republic. It furthermore agrees to abide by the formalities for obtaining the admission of the shares upon the French Banking Market. The bankers on the other hand, bind themselves to give all their assistance in respect of these various formalities so they may be accomplished in the shortest possible time.

Article Two: The cost in respect of application for compound duty on the shares and for deposit in respect to annual taxes to the Administration of Registration of Property and Stamp, as also the compound duty on complaint stamping, and further the cost of publication in the official journal for obtaining the free circulation of the said shares in France, together with the expenses attached to the quotation of the shares and cost of printing the same to bearer, as also all cost of advertising in the daily press of Paris and the provinces, or in other financial papers and generally the cost of issuing, are all together reckoned to amount to a minimum sum of $45,000.00. This amount and any expenses exceeding that

amount, the vendor does not agree to supply or pay, and the vendor is not nor shall it be in any way liable therefor, but the same shall be subject to arrangement and agreement between the said Peyton B. Locker, personally, and not as attorney in fact, and the said bankers.

Article Three: The vendor hereby gives to the bankers, an option for three months after the necessary documents have been handed over, to authorize the placing of shares, to place 150,000 shares of its capital stock, of [32] the par value of $2.00 each, at a price of 6.25 francs per share.

In consideration of said option, said bankers further agree and firmly bind themselves, that they will within said three months, purchase from said vendor, one-half of the said 150,000 shares, being 75,000 shares, and pay vendor for the same within said three months, at the price of 6.25 francs per share.

In the event of said bankers having at the expiration of said three months, placed and paid for the whole of said 150,000 shares, the vendor hereby gives to the bankers, a further option for six months after the expiration of said three months, to place a further block of 150,000 shares of said stock at the price of 6.25 francs per share.

In consideration thereof, the said bankers agree that should they exercise this second option they will pay to the vendor for all of said stock they may place, the price of 6.25 francs per share, and they further agree and firmly bind themselves that should they exercise this second option, they will within six months purchase from said vendor, one-half of said

150,000 shares, being 75,000 shares of this second option, and pay vendor for the same, within said six months, at the price of 6.25 francs per share.

In the event of said bankers having at the expiration of said six months placed and paid for the whole of said 150,000 shares, the vendor hereby gives to the bankers, a further option for three months after the expiration of said six months, to place a further block of 150,000 shares of said stock at the price of 6.25 franc per share.

In consideration whereof, the said bankers agree that should they exercise this third option, they will pay to the vendor for all of said stock that they may place, the price of 6.25 francs per share, and they further agree and firmly bind themselves that should they exercise this third option, they will within three months purchase from said vendor, one-half of said 150,000 shares, being 75,000 shares of this third option, and pay to the vendor for the same within said three months, at the price of 6.25 francs per share.

Article Four. The shares shall be delivered by a trustee and shall represent nominative certificates deposited by the company in the hands of the said Trustee. The shares so delivered shall be to bearer under the seal of the company, with coupons attached and conjointly signed by the duly authorized officers of the company and the trustee. The said 150,000 shares to be first delivered, shall be in the following denominations.

20,000 certificates to bearer of five shares each, 5,000 certificates to bearer of ten shares each, and this shall also apply to further blocks of shares so

far as same has not been altered, if required by mutual consent of the parties.

A specimen of the shares shall be supplied by the bankers.

Article Five: The bankers bind themselves to obtain as soon as possible, a quotation of the said shares on the French Bank Market, nevertheless, the sale of the shares by the bankers may commence before the necessary formalities in respect of said quotations have been fulfilled.

Article Six: The vendor agrees and binds itself to have the said shares listed on the New York curb exchange.

Article Seven: The trust certificates to bearer shall be lodged by the vendor in a Parisian Bank to be nominated by the vendor, which shall hold same at the disposal of the bankers against payment.

Article Eight: The vendor agrees not to issue certificates to bearer for a larger quantity than that of 450,000 shares above mentioned, but as the vendor shall still hold a further 130,000 capital shares for disposal, they give by these presents to the bankers a preference right thereto, if the said vendor decided at any time to place the same, being the said 130,000 shares or part thereof in Europe.

Article Nine: The vendor binds itself to establish an office of this company at the Bankers' Banking House, for giving information, and shall pay an annual rent of frs. 5000, provided, however, no rental shall be charged by the bankers unless and until they have paid for the first 150,000 shares under this contract, upon which payment the vendor binds itself

to pay the said five thousand francs, annually for a period of three years, and upon payment by the bankers, for each succeeding 150,000 shares, the vendor binds itself to pay said five thousand francs for an [33] additional period of three years, provided further, that the bankers shall hold the said office properly furnished, lighted and heated, and shall without charge, furnish one English speaking clerk to attend especially to the business of the vendors.

Article Ten: It is hereby agreed that the dividend coupons shall be payable in Paris without any deduction for commission or discount, except legal taxes, and the bankers are hereby appointed as financial agents for the payment of the said dividends, and shall be allowed a commission of francs five per francs one thousand paid in coupons of the company.

If, however, the bankers deem it necessary to transfer the payment of the coupons to another bank, then they shall give the latter the said francs five in respect of each frs., one thousand paid in dividends.

All dispute arising under these presents shall be referred to the Tribunal of Commerce of La Seine, which is hereby declared to be alone competent to deal with the same.

Made in duplicate in French and English, in Paris, this —— day of ————, 1910.

TENABO MINING AND SMELTING COMPANY,

Vendor.

By ————————,

Attorney in Fact.'

Given and granted unto the said attorney, full power and authority to do and perform all acts and things whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as it might or could do if personally present, hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, this corporation causes these presents to be signed by its president and its Secretary, and its corporate seal to be affixed hereto, this —— day of March, 1910.

TENABO MINING AND SMELTING COMPANY,

By ————————,

President.

————————,

Secretary."

(Acknowledgment.)

XI.

That the said Peyton B. Locker and John Janney expended large sums of money in securing stock certificates, in paying assistant secretaries, vice-presidents, attorneys, and in securing the influence of men of high standing financially, politically, and socially, and secured favorable consideration from the Franco-American Banque of Paris, France, and have succeeded, as your orator is informed and believes, in placing the said 450,000 shares of the capital stock of this corporation upon the market in France, paying therefore a tax of $10,000.00 to the French Government, and incurring other indebtedness in estab-

lishing an office and securing the service of agents and representatives.

XII.

That the extensions of time for the performance of the conditions of said contract by the said Peyton B. Locker were made from time to time, and on the 6th day of February, 1911, the following proceedings were had at a regular meeting of the said board of directors of defendant [34] corporation:

"Whereas, large sums of money are being expended by P. B. Locker, in the work of financing the treasury of this company by the sale of treasury stock in Paris, France, $4,368.57 being the Windsor Trust Company bill for printing French bearer certificates, of which $2,000.00 has been paid; $1,310. 00, $610.00, $410.00, bills for services of Vice-presidents and Assistant Secretaries in signing 45,000 certificates; French taxes and dues approximating $10,-000.00, Trustee Fee to Windsor Trust Company $3,000.00; also attorneys fees for legal advice in Paris, and sundry other incidental expenses: and

Whereas, this Company is not paying any part of these expenses but is receiving the benefit therefrom and is therefore, interested in the success of negotiations which require expenditures of large sums of money on the part of said P. B. Locker, and

Whereas, said Locker has advised this company that he can secure a loan from a French Bank upon his note, provided he can secure the issue of 50,000 shares in French bearer certificates, and has asked for a loan of the same, offering to secure this company by 70,000 shares of stock of this company which

is owned by him and associates;

Now, therefore, be it resolved that this company loan to the said P. B. Locker, 50,000 shares in French bearer certificates for a period of six months, upon the deposit by the said P. B. Locker with the Windsor Trust Company, to the credit of the Tenabo Mining & Smelting Company, as collateral security, of 70,000 shares of stock of this, the Tenabo Mining and Smelting Company, upon the condition that the consent of the loan of said 50,000 shares in French bearer certificates be obtained from Mr. Bernard Desouches, 148 Avenue Malakoff, Paris, France, and also from the members of the Underwriting Syndicate, with whom this company has contracts relating to the said stock; and

Resolved, that this company authorizes the payment of $25,000.00 to the order of P. B. Locker from the money deposited in the Franco-Americane Banque to the credit of this company, from the sale of the first allotment of 150,000 shares of stock, not however, until the entire allotment of 150,000 shares aforesaid, has been paid for in full, and upon condition that the said P. B. Locker deposited with the said Franco-Americaine Banque, 50,000 shares of stock of this company as represented by five thousand French bearer certificates of the denomination of ten shares each, heretofore loaned to the said P. B. Locker by the Tenabo Mining and Smelting Company, for the purpose of providing funds for expenses and so forth.

Resolved that the Franco-Americaine Banque be, and the same is hereby, authorized and instructed to

turn over to the order of P. B. Locker, of the Hotel Chatham, Paris, France, and Mr. Bernard Desouches, party of the second part in a contract authorized by resolution adopted March 5th, 1910, five thousand French Bearer certificates of the denomination of ten shares each, upon the deposit by the said P. B. Locker with the Franco-Americaine Bank, or with the Windsor Trust Company of New York, or part with one and part with the other, a total number of shares which will aggregate 70,000, said shares to be deposited to the order of the Tenabo Mining and Smelting Company."

XIII.

That after the expenditure of the money as hereinabove set out, on the 13th day of December, 1910, said directors passed a resolution authorizing the President and Secretary to execute a mortgage on all of said property to W. H. Sherman, of Salt Lake City, Utah, for $1,500.00, and to give the said W. H. Sherman one thousand shares of stock for making said loan to said corporation, and thereafter said mortgage was executed and said stock delivered, and is now a subsisting liability of said corporation.

XIV.

Your orator is informed and believes that the said Peyton B. Locker is [35] financially irresponsible, and the said board of directors by said resolution has pledged the corporate assets, without consideration, for the personal use and benefit of the said Peyton B. Locker, and have permitted him to appropriate $25,000.00 of the money due or to become due said corporation, and have contributed to

the perpetuation of fraud upon innocent purchasers of said stock, by authorizing and permitting the said Peyton B. Locker and his numerous agents and representatives to represent that he was selling the treasury stock of said corporation, when, in truth and in fact, he would be selling his own individual holdings, to the injury of the credit of the corporation. Your orator further says that all moneys received, except the money paid to W. S. McCornick on said mortgage, the nature and consideration of which is unknown to your orator, has been paid to the present and the former directors as compensation for services alleged to have been rendered and to the said Hiram Tyree and P. B. Locker as unconscionable and fraudulent commissions, and otherwise misappropriated and squandered; that the Little Gem mine has filled with water and no development work has been done, and said corporation is now insolvent and bankrupt, and all of the property mortgaged for purposes other than the development of said mine.

XV.

Your orator further says that a regular stockholders' meeting was called for the 13th day of February, 1911, for the election of a board of directors. That said Hiram Tyree, caused proceedings to be instituted in the District Court for Salt Lake County, State of Utah, to enjoin the voting of the stock issued to a trustee to in turn to be issued to prospective purchasers in France, which proceeding caused the continuance of said meeting to the 13th day of May, 1911. That at said meeting the Tyree interests

claiming to have control disregarded the ordinary rules of procedure and elected a board of directors of said corporation, and your orator is informed and believes that said board is now assuming to act as the legal representatives of said corporation. That other stockholders disregarded the proceedings of the said Tyree interests, and likewise elected a board of directors, four of whom succeeded themselves and and assuming to act as the legal representatives of said corporation. [36]

XVI.

That a bitter contest is being waged by the conflicting interests of said corporation, and in view of the numerous fraudulent acts, the misappropriation of funds, the extensive and fraudulent promotion schemes by the said Peyton B. Locker and the said Hiram Tyree, and their numerous agents and representatives, the assets consisting of the said mining property located in Nevada, are jeopardized and will be wasted, squandered and lost to the stockholders of the defendant corporation, unless the Court enjoins the further selling of stock in the defendant corporation, and by a receiver, takes possession of all of said property; and complainant has no plain, speedy and adequate remedy at law.

In consideration whereof, and inasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief herein prayed, and make a full disclosure and discovery of all of the matters aforesaid, according to the best and utmost of its memory, knowledge, in-

formation, and belief, full, true, direct, and perfect answer make to all the matters herein stated and charged, but not under oath, answer under oath being hereby expressly waived your orator prays:

1. That the defendant be required to appear and show cause at a time certain, why it should not be enjoined and restrained from selling, agreeing to sell, giving options to sell, or causing to be sold, and from permitting any of its officers, agents, trustees, or representatives to sell, transfer, or agree to sell, in the United States, France, or elsewhere, any of its treasury stock or any of its capital stock not outstanding; and in the meantime, and until the said orator can be heard, that defendant, its officers, agents, trustees and representatives, be temporarily enjoined from doing, or permitting to be done, any of said acts.

2. That defendant be required to appear and show cause, if it has any, why a receiver should not be appointed by this Court, to take charge of all of the assets of said corporation located within the State of Nevada, and particularly all mining property and claims owned, claimed or controlled by said corporation, located in the county of Lander, State of Nevada, or elsewhere in said State. [37]

3. That said receiver be authorized and directed to cause ancillary receivers to be appointed in States other than the State of Nevada, to sue for and recover all moneys and property lost or misappropriated by the directors or officers of said corporation.

4. That all of the assets of such corporation be sold and converted into money, and after payment

of the costs and expenses of this proceeding, including counsel fees, that said assets be distributed among the creditors and the surplus, if any, be distributed *pro rata* among the stockholders of defendant corporation.

5. That to enable the Court to make a just distribution of said assets among the persons entitled thereto, that the Court cause proper notice to be given to all creditors and stockholders having claims against said corporation or stock therein, and if claims or stock should be in dispute, that the same be established by the judgment of competent tribunals.

6. And your orator further prays for himself and for all others similarly situated, for such other and further relief as the Court may deem meet and proper.

May it please your Honors to grant your orator a writ of subpoena of the United States of America, directed to the said defendant, the Tenabo Mining and Smelting Company and such others as shall, in the discretion of your Honors, be necessary for the hearing and determination of this cause, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such orders and decrees in the premises as the Court shall deem proper and required by the principles of equity and good conscience.

J. D. SKEEN,
Solicitor and Complainant.

J. D. SKEEN,
Of Counsel for Complainant. [38]

State of Utah,
County of Salt Lake,—ss.

J. D. Skeen, being first duly sworn, upon oath deposes and says: That he is solicitor for the complainant above named. That he has made an examination of the books and records of the defendant Tenabo Mining and Smelting Company, and has conversed with the officers and agents of said corporation respecting the conduct of its affairs, and is better informed with respect to said things than the complainant above named, and for that reason makes verification of this bill.

That he has read the foregoing bill, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

J. D. SKEEN.

Subscribed and sworn to before me, this 27th day of May, 1911.

[Seal] CLARENCE CRAMER,
Notary Public in and for Salt Lake County, State of Utah.

My commission expires Jan. 10th, 1912.

[Indorsed]: No. 1164. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Charles D. Bates, Complainant, vs. Tenabo Mining and Smelting Company, a corporation, Defendant. Bill of Complaint. Filed May 29th, 1911. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.

[Indorsed]: No. 1183. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Charles D. Bates vs. Tenabo Mining & Smelting

Company. Answer to Bill of Complaint. J. D. Skeen, Atty. for Plaintiff. H. C. Edwards, Atty. for Defendant. Filed October 16, 1911. T. J. Edwards, Clerk. [39]

In the Circuit Court of the United States, District of Nevada, Ninth Judicial Circuit.

No. 1183.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,

Defendant.

Replication.

The replication of the above-named plaintiff to the answer of the above-named defendant.

This replicant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto saith that he does and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, tra-

versed or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humble as in and by said bill he has already prayed.

J. D. SKEEN,
Solicitor for Complainant.

SHANK & SMITH,
Of Counsel.

[Indorsed]: No. 1183. In the Circuit Court of the United States, District of Nevada, Ninth Judicial Circuit. Charles D. Bates, Complainant, v. Tenabo Mining & Smelting Company, a Corporation, Defendant. Replication. J. D. Skeen, Solicitor for Complainant, Kearns Building, Salt Lake City, Utah. Shank & Smith, of Counsel, 1002 Alaska Building, Seattle, Wash. Filed November 29, 1911. T. J. Edwards, Clerk. **[40]**

In the District Court of the United States, in and for the District of Nevada.

No. 1183—IN EQUITY.

CHARLES D. BATES,
Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,
Defendant.

Decree.

This cause came on regularly to be heard and was argued by counsel for the respective parties, and

upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED:

I.

That J. P. Raine, of Pine Valley, State of Nevada, be and he is hereby appointed receiver of the Tenabo Mining & Smelting Company, defendant herein, a corporation organized under and pursuant to the laws of the State of Nevada, and said receiver is hereby authorized and directed forthwith to take possession of all of the real and personal property of said corporation located within the State of Nevada, including all books, papers and documents of every name, nature and description, and particularly the following mining claims: Little Gem, Ollie, Reno, Winnemucca, Two Widows, Two Widows Extension, Copper Hill Group and Nevada Phoenix, together with all machinery, tools, appliances and other personal property located upon or used in connection with said mining claims, all of which said property is located in Lander County, State of Nevada.

II.

To examine, or cause the books and records of the defendant Tenabo Mining & Smelting Company to be examined, and from said books and from such other sources of information as may be available, to ascertain:

(a) The authorized capitalization of said corporation, the number of shares issued and outstanding on the first day of October, 1912, and the number of shares in the treasury of said corporation on said date; also whether or not stock has been issued and sold by the officers and agents of said corporation

since said date, and if so, to whom and for what consideration.

(b) To ascertain from said books and otherwise the money on hand [41] on the 1st day of October, 1912, if any, and the nature and amount of the indebtedness of said corporation, to whom and when payable, and whether in money or in stock of said corporation, also whether or not any indebtedness has been incurred by the officers and agents of said corporation since the 1st day of October, 1912; and if so, the nature, amount and consideration of said indebtedness.

III.

To sell for cash at public sale all of the real and personal property of said corporation, and particularly the following mining claims located in Lander County, State of Nevada, to wit: Little Gem, Ollie, Reno, Winnemucca, Two Widows, Two Widows Extension Copper Hill Group and Nevada Phoenix, together with all machinery, tools, and appliances, and all other property owned by said corporation and located in the State of Nevada, said sale to be made upon said premises at Tenabo in Lander County, State of Nevada, it appearing to the Court that it is best to sell the said personal property in the manner hereinabove specified, provided that said receiver shall first give notice of said sale of publication thereof for at least once a week for four weeks prior to said sale, in a newspaper printed, regularly issued, and having a general circulation in Lander County, State of Nevada, if any such there be; and if there be no such newspaper published in said Lander

County; or if the receiver in his discretion shall consider some other paper more advantageous, then the publication shall be in such paper so specified or selected, and having a general circulation in the State of Nevada, and said notice shall specifically describe the real and personal property to be sold. Provided, that said property shall not be advertised for sale, nor sold, until after the lapse of ninety (90) days from date hereof; nor until the further order of the Court fixing the time of sale, and other conditions, if any, that the Court may deem proper.

IV.

Said receiver is hereby directed to give notice to all creditors by publishing such notice in the ———, once a week for four consecutive weeks, directing all creditors to file their verified claims with the receiver at an address to be specified, within (90) days from the date of the first publication of such notice; and that all claims not so filed shall be barred; and shall likewise mail a copy [42] of said notice to each known creditor, provided that before the presentation of any claims for the approval of this Court, notice thereof, with a list of such claims, shall be served upon the attorneys of record herein.

V.

Said receiver is hereby directed to keep a complete record of his doings in the premises, including an inventory of all property received, held, or sold; all money expended and debts incurred, and at the earliest practicable date report fully to this Court the exact status and condition of the affairs of said corporation, and of his administration thereof.

The said receiver is further directed to hold all cash received from any source, to be disbursed under the orders of this Court, for the payment of expenses of this receivership, including such reasonable allowances as solicitors' fees and expenses for bringing this action as the Court may deem proper, and distribute the balance under the orders of this Court.

VI.

That before entering upon the performance of his duties as such receiver, said J. P. Raine shall take an oath of office to faithfully perform and discharge his duties, and execute and deliver to the Clerk of this Court a good and sufficient undertaking, conditioned as provided by law, in the penal sum of $7,500.00, payable to the Clerk of this Court, the Court hereby reserving the right to increase said bond at any time.

Dated this 14th day of February, A. D. 1914.

E. S. FARRINGTON,
District Judge.

[Indorsed]: No. 1183. In the District Court of the United States, in and for the District of Nevada. Charles D. Bates, Complainant, vs. Tenabo Mining & Smelting Company, a Corporation, Defendant. Decree in Equity. Filed February 14th, 1914. T. J. Edwards, Clerk. [43]

[Notice of Lodging of Condensed Statement of Evidence, etc.]

In the District Court of the United States, in and for the District of Nevada.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,

Defendant.

Comes now the Tenabo Mining & Smelting Company, defendant and appellant in the above-entitled cause, and lodges the hereto attached condensed statement of the evidence in the foregoing case in the Clerk's office of said court for examination of the other parties to said action, and for the approval by the Honorable Court under and subject to the provisions of Rule No. 75 of the Federal Equity Rules, and when approved, to constitute part of the record on appeal in said cause.

H. C. EDWARDS,
Solicitor for Appellant. [44]

In the District Court of the United States, in and for the District of Nevada.

No. 1183—IN EQUITY.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,

Defendant.

Statement of the Evidence for Use on Appeal.

This cause came on regularly to be heard in the above-entitled court on Thursday, the 5th day of September, 1912, at two o'clock P. M., before the Honorable E. S. Farrington, Judge of the said court; Mr. J. D. Skeen and Mr. Carwin S. Shank appearing as solicitors for the complainant, and Edwards & Ashton appearing as solicitors for the defendant, whereupon the following proceedings were had and testimony taken and introduced:

[Testimony of John Janney, for Plaintiff.]

Mr. JOHN JANNEY, called as witness for the complainant, after being duly sworn, testified as follows:

Direct Examination by Mr. SHANK.

I reside at Twin Falls, Idaho, and have resided there since 1906. Am secretary of the defendant corporation. I have produced in court all of the books, records and documents of that company; I have them here, except a package that Mr. Ferry, the president of the corporation, has expressed and which will be here.

The defendant company has been using my office since March or February, 1911. This paper marked "Plaintiff's Exhibit 1" is the articles of incorporation of the defendant company. I became the secretary of the defendant company on the 5th day of March, 1910. I was a stockholder in the subsidiary company, the Tenabo Consolidated Mining Company, and as a director and stockholder I was interested and voted on the question of the formation of the

(Testimony of John Janney.)
defendant company, and negotiated with the possibility of forming this alliance and tried to determine whether it was wise to consolidate these two companies, and tried to find out if there was a feasible way of getting them together. These [45] negotiations were with Mr. Locker and Mr. Tyree. Mr. Locker and I were interested in the Tenabo Consolidated Mining Company. We held, I guess, fifty per cent of the stock of that company. Mr. Tyree was the president of the Gem Consolidated Mining Company. Personally I never planned for the sale of the stock of the defendant company until my return to Salt Lake City, until after the corporation was formed. My plan up to that time was not to have anything to do with the financing of this company, the plan was that Mr. Locker and Mr. Tyree had brokers in the east who could finance the company; then after the company was organized, some month or two, it might have been three or four weeks, Mr. Locker and Mr. Tyree came to me and explained that they would like to have me drop my other work and all of us join ourselves together and finance this company and get it done with and then take up the other things after. There were plans to have five hundred thousand to be treasury stock. The Gem was to get four hundred thousand to pay for the Little Gem property, the Tenabo Consolidated Mines Company was to get three hundred thousand shares and one hundred thousand remaining; and also the proceeds from the sale of two hundred thousand shares of outstanding stock to be equally divided between Tyree

(Testimony of John Janney.)

one-half and Locker and Janney one-half. That was before the incorporation of the Tenabo Mining & Smelting Company and also it was subject to the subsequent ratification of this plan by the directors and by the stockholders of the companies. That was reduced to writing. This writing was marked "Complainant's Exhibit 2" and offered in evidence, but was objected to by Mr. Ashton as incompetent, irrelevant and immaterial and not within the issues, but was overruled by the Court, the Court saying: "I of course do not know what there is in the document, and I think I will simply admit it subject to the objection, and of course, if it is irrelevant and immaterial, I will not consider it. Exhibit 2 reads as follows:

"New York, June 25th–08. Memorandum of Agreement of Division of Stock. To form a Consolidated Company of 1,500,000 shares, of which 500,000 shares to be treasury stock. Highland to have 500,000 shares of stock at 25¢ a share—300,000 shares treasury stock and 200,000 shares outstanding stock. [46]

This leaves 800,000 shares of outstanding stock to be distributed as follows: 400,000 shares to pay for Little Gem properties. 300,000 shares to pay for Tenabo Consolidated properties. 100,000 shares remaining and also the proceeds from the sale of 200,000 shares of outstanding stock to Highland is to be equally divided between Tyree, one-half, and Locker & Janney, one-half. (Signed.) H. Tyree. John Janney."

(Testimony of John Janney.)

The COURT.—I presume this testimony goes to your statement or to the issue that it was a stock-jobbing concern rather than a legitimate mining concern?

Mr. SHANK.—Yes.

The COURT.—I will state in nearly all these cases where there is no jury, it has been my practice to admit all the testimony which is offered apparently in good faith by either party, provided it has any bearing whatever on the case, and it usually goes in subject to that objection, and if at the close of the case you still wish to insist on those objections, I should like to have them called to my attention. Of course there will undoubtedly be a vast amount of testimony introduced in this case; some of it will be very relevant, and some of it will be rather questionable. And when I come to consider that testimony, I shall not take it all, I shall simply take those points which seem to me, and which seem to counsel in the course of their arguments to be material. I do not like to take the time during the progress of a case in listening to arguments on the admission of testimony, unless it is something which you regard as absolutely vital to your case.

Mr. ASHTON.—In that connection—while the matter is fresh in our mind, I desire to call attention to the fact that it does come within the statement made by counsel, but does not come within the issues as framed by the pleadings in this case. There is no allegation this was a stock-jobbing proposition but that is *confirmed* wholly to the statement of coun-

(Testimony of John Janney.)

sel; there are no pleadings whatsoever where that allegation is made.

Mr. SHANK.—I don't need to plead it was a stock-jobbing proposition, or robbing proposition, or anything of that sort. I plead, as a matter of fact, it is not a fact, in any proper sense, a corporation organized for legitimate purposes. That comprehends the whole thing. That is definitely pleaded, and that is all that need be pleaded. I do not need to particularize the details by which it is not a concern properly conducted. [47]

The COURT.—Where is the allegation?

Mr. SHANK.—Paragraph 10, your Honor. Your Honor will see that covers in general terms, the situation. (Reads.) There is a specific and definite allegation upon that very point, that the whole thing was simply to sell its treasury stock, and not actually to do a legitimate business, as defined by its articles of incorporation.

The COURT.—Was this agreement as to the sale of treasury stock?

Mr. SHANK.—No, this was for the disposition of all its stock, and bears upon the treasury stock, as well as all the other stock.

The COURT.—It will be admitted subject to the objection.

Mr. SHANK.—I don't know what the rule is in reference to preserving exceptions. I want to expedite the case as much as possible. I am just asking for information. With us an objection implies an exception.

(Testimony of John Janney.)

The COURT.—The exception will be noted if you desire to have an exception taken. The testimony is admitted subject to that objection and that means simply that the Court may change its mind before we are through with the case.

Mr. ASHTON.—The query we are both interested in is whether or not we shall preserve our exceptions as these *pro forma* rulings are made?

The COURT.—I think you had best do that. An objection is made, followed by an exception, after the ruling of the Court, if you desire to take one.

Mr. ASHTON.—I desire to save an objection.

WITNESS.—There was some stock sold by Mr. Locker in the early part of 1909, I believe in February. It was sold to some gentlemen in Salt Lake City, one of them I remember was Mr. Knox. I don't know how much was sold to Mr. Knox, I have not as yet had the books of the company formerly made out. We have no book in which to make entries of cash receipts. We have only entered in the bank some six or eight entries and the entry that is made in the bank there is a voucher made for that purpose. The defendant company has a voucher. I have the vouchers. I find on looking at the minutes where I thought the name of Mr. Knox appeared, which includes a list of stock of those to whom Mr. Locker sold stock, that Mr. Knox's name is not present. I would say it is possible that Mr. Locker sold to Mr. Knox a contract to deliver to him stock at some later [48] date. I remember Mr. Locker was in a position where he required funds in order to start his

(Testimony of John Janney.)

work of the financing of the company and he secured those funds from Mr. Knox and a few others, by what possibly was a contract that he would deliver to him so many shares of stock, but I don't know anything about that transaction except what I have heard, and that was not very definite. I do not know whether Mr. Knox ever acquired any stock. Page 25 of the minute-book shows minutes of the meeting of January 25, 1910. They are as follows: "Salt Lake City, January 25, 1910. Minutes of Directors' meeting of Tenabo Mining & Smelting Company held this day pursuant to due notice. Present Messrs. Clark, Varian, Edwards and Badger. Moved by Mr. Edwards that Mr. Varian be authorized to incur any necessary expense and to employ an attorney to represent this company at Austin, Nevada, in suit Lloyd Seaman vs. Gem Consolidated Mining Company, duly seconded and unanimously carried. Moved by Mr. Edwards that Windsor Trust Company be authorized to issue stock to the following named persons who have paid for same and who hold receipts for the number of shares set opposite their names:

Olsen	500	shares.
Auerbach	100	"
Wilson, C.	500	"
Wilson, E.	500	"
Rinking	500	"
Phelps	500	"
Crandall	110	"
Newcomb	100	"

(Testimony of John Janney.)

Pitts	50	"
Berry	100	"
Nettenstrom	200	"
Petitt	100	"
Paige	50	"

Mr. Locker presented proposed contract with a French Bank which was discussed. On motion meeting adjourned. R. T. Badger, Secretary."

I would like to explain that this resolution was the voting of the issues of stock to these parties who had signed applications for the purchase of the stock. I do not know that this company sold to F. J. Hagenbarth 4,000 shares at 50 cents per share, or 5,000 shares to Frank Knox at 50 cents per share, or 2,000 shares to Mr. McCormick at 50 cents per share, or to the Anheuser-Busch people at St. Louis 2,500 shares at 50 cents per share; all I know about that is that it is hearsay. I don't think I ever heard of the Anheuser-Busch sale. I don't think there is any record made by Hiram Tyree in the east, I never heard of such a record. The only record that we had were the minute book and the vouchers. To execute a [49] voucher receipt we entered the transaction on the voucher just as you enter it on your book, only you do not open books of the corporation usually until you have got enough entries so an expert could come in and open your books right, at least no company that I ever was connected with did.

Here Mr. Shank asked the witness for the vouchers showing all of the receipts of the company and is given a bundle which the witness says are all the

(Testimony of John Janney.)

vouchers. Those are all the vouchers we have; that pile of vouchers you have there wrapped up, together with a bundle, contains all of the credit and debit vouchers too, if I am correct in my impression, but the other bundle contains a record that has not been completed because I have been away from the office and the vouchers that represent money which has been received have not been written up since the date of my going east. That was in December last year. I have a record of all of the receipts that have been made but they have not been entered yet on the vouchers. Here is a statement which shows what we have received. It is a statement from the Franco-American Bank. This statement is contained in these letters and other papers that you have. The certificate books are in the hands of the express company. They should be here. They are coming from Mr. Ferry. We have two stock records. I don't know whether you would call them ledgers or not. One is kept by the Union Trust Company in New York who registers all the certificates of stock. A certificate of stock is not completed until it has been registered by the Union Trust Company of New York, and when they register a certificate of stock they make an entry in their books and here is that record. Then the stock is also, before it is issued, transferred or written up and in fact issued by the Windsor Trust Company, the Windsor Trust Company keeping a record and here is their record. I have been keeping part of these records in my office and part of them in a safe deposit box. I mean the

(Testimony of John Janney.)
office of myself and Mr. Locker. We have been considering it the office of the company. I returned from the east when I got notice of this suit. I arrived in Salt Lake last Tuesday. I left here last November and returned the latter part of August, 1912. These records were all kept in my office and in safe deposit vaults. I have a box in the Merchants' Bank [50] and one in the Utah Savings & Trust Company. I mailed a key to my office to Mr. Ferry, president of the company. I did not tell him or any officer or agent of the defendant company where those records were kept. I told Mr. Ferry where they were. I sent him a key to my office and told him if he wanted anything there was a key to my office. I would like also to say that when I went away I expected to be gone only a few weeks. I was gone eight months. No money was received by me; it was received by the treasurer of the company. While I was away I knew all about it that a man could know. These letters that came to me were kept by me and those that went to Mr. Howard were kept by him. We have no mining claims patented, except two, the rest of them are simply locations that we have to work the assessment on each year. We have no other property, no office furniture, no safe or other office equipment. In order to economize the company's expenses things of that nature are now furnished to the company by others free of charge. The services of the officers are furnished at a nominal price that amounts to the same thing. The salaries of the different officers have been fixed by the Board of Direc-

(Testimony of John Janney.)

tors. In the minutes of the corporation of date the 7th of January, 1909, it provides for the payment of $50.00 a month to Judge C. S. Varian, as attorney for the company. There is another resolution of the same date providing for the payment to H. P. Clark, president, H. C. Edwards, vice-president, R. T. Badger, secretary and treasurer a monthly salary of $50.00 to each of said officers. There is no limit of time fixed in the resolution. It was never modified that I know of. The cash record will show the amount that was paid, I cannot speak from memory. I think Mr. Edwards received no money except a sum of money that he got as attorney's fees. I do not think he got that $50.00 a month. By cash record I mean the vouchers shown a moment ago. They and this statement would show how long that continued. I did not make this statement, it was made by a certified accountant, J. W. Edmunds, of Salt Lake City. It shows under the head "legal fees and salaries" the amount paid up to the date of that statement. This is a statement from the beginning of the company down to the date of August 21, 1911. This other is a statement from the beginning of the company down to [51] February 9, 1910; both statements are complete down to the dates specified. They are a correct showing of the books of account of the company as far as I know. I submitted to Mr. Edmunds all the vouchers and documents to make up this report. I do not know of my own knowledge but that is correct. On March 5, 1910, there was a subsequent resolution passed bearing

(Testimony of John Janney.)
upon the salaries that were to be paid to any subsequent Board of Directors. At that time there was a change in the Board. The Board of Directors designated in the articles of incorporation, that is Mr. Clark, Mr. Freed, Mr. Badger, Mr. Varian and Mr. Edwards continued to hold as directors until February 5th, 1910. On February 5th W. Mont Ferry, E. O. Howard, Benner X. Smith, John Janney and John Pingree were elected directors. They are still in office. None of the first directors were named by me. I was a member of the directors of the Tenabo Consolidated Company. As well as I recollect the board of the new company was a part of the agreement of these two corporations when they merged. A list of directors was presented, as I recollect, to the board and they approved of these directors when they merged but I am not going to be positive about that; that is a matter of memory and those things occurred a long time ago. That board held until the early part of 1910, when the present board was elected. After the election of the present board there was another resolution fixing their salaries. It was on the date of March 5, 1910. The part of the resolution fixing the salaries reads as follows: "Resolved that the directors of this company be allowed as compensation the sum of $50.00 per month each." "Resolved that Stephens, Smith & Porter, attorneys, be employed as the attorneys for the corporation." There was $713.49 in the bank February 9, 1910.

(Testimony of John Janney.)

There was practically none of it paid out as far as I remember.

Court adjourned until September 6, 1912, at 10 A. M.

Witness JOHN JANNEY, direct examination by Mr. SHANK continued.

I am in a way a partner of Mr. P. B. Locker. I have equal stock interests in certain corporations and as stockholders in those corporations we distribute among ourselves the labor of making a success of those corporations and also distribute among ourselves the benefits derived from such labors. These corporations include the Tenabo Consolidated Mines Company which holds stock in the Tenabo Mining & Smelting Company. That [52] partnership was formed in 1907 and continues to this date. We have never had any articles of agreement drawn. The firm name is Locker & Janney. We have an office. The office bears the name of P. B. Locker and John Janney, but not the name of Locker & Janney and the letter head printed "Locker & Janney" was printed one day when I was away from the office. I think it was in 1907. I concluded to let it go. I heard of the sale of 2,000 shares of stock to J. D. Wood, 4,000 shares of stock to F. J. Hagenbarth, 5,000 shares to Frank Knox, 2,000 shares to William McCornick, 1,000 shares to Auerbach and 2,500 shares to an agent of the Anheuser-Busch Brewing Company. I heard of it in June or July, 1909, in New York. I heard an explanation from Mr. Locker as to the sale of that stock but I don't think there was any conversa-

(Testimony of John Janney.)
tion in my presence between C. C. Wylie and P. B. Locker in New York in reference to the sale of treasury stock to these particular parties named. I think I would recall if there was any. I heard Mr. Locker make an explanation that there has been this stock sold and the parties to whom it was sold had paid Mr. Locker and give him checks drawn to the order of the Tenabo Mining & Smelting Company. I saw one check, I believe, but I don't remember to whom that check was drawn. I think it was a thousand dollars and signed by W. S. McCornick. Mr. Locker gave it to Mr. Badger, secretary of the company, and he turned it into the company. I did not see any signed by Hagenbarth but I might have seen a check signed by Mr. Knox; I am not sure of that. I did not see any signed by Mr. Olsen or by J. D. Wood. The minutes of July 3, 1909, found on page 13 of the minute-book, are part of the minutes of the Tenabo Mining & Smelting Company and read as follows:

"Minutes of meeting held July 3d, 1909, pursuant to due notice. Present H. P. Clark, H. C. Edwards, C. A. Varian and R. T. Badger." "Upon motion the secretary was instructed to write to Mr. P. B. Locker, requesting information regarding the sale of stock in the Tenabo Mining & Smelting Company to Messrs. Frank Knox, W. S. McCornick, F. J. Hagenbarth, Hugh Wood and Mr. Olsen, and requesting to know whether it was thoroughly understood between him and the various parties that money paid to him by them was to go into the Treasury of the company,

(Testimony of John Janney.)

and that they were not receiving treasury stock for their subscriptions. [53]

"On motion the secretary was instructed to inform Messrs. Locker, Janney and Tyree that option given them for sale of 600,000 shares of treasury stock, dated Jany. 14th, 1909, would be cancelled July 15th and that same would be of no further force or effect after said date.

"On motion, the meeting adjourned. T. R. Badger, Secretary."

There were inquiries made with reference to a sale of stock from Mr. Locker and he made reply in writing. It was a partial reply from Mr. Locker with reference to the inquiry that was made. There was a written and verbal statement made. The three writings that are here and are attached came as a reply to the company from Mr. Locker. They were all attached together when I got them from the secretary. I don't know how they were transmitted by Mr. Locker to Mr. Badger, whether as one instrument or at separate times. I think Locker had typewritten the third leaf of this bundle of papers which is not signed and has no heading and consists simply of typewriting and I knew that he made that reply. I know that Mr. Badger had these three pinned together on turning over the records. I know that at the time Mr. Locker wrote this letter of July 12th, I was in New York with him and read it, and to the best of my recollection and belief that is what was pinned to it. I feel confident that he did. (Letter admitted in evidence, marked Complainant's Exhibit

(Testimony of John Janney.)
No. 3, and read by counsel.)

The report of P. B. Locker to the Tenabo Mining & Smelting Company under date of February 28th, 1910, is a report made to Mr. R. T. Badger, as treasurer of the company. (Paper admitted and marked Complainant's Exhibit No. 4.)

At this point it was agreed between counsel that only the last page of the report made by J. W. Edmunds above mentioned was material and this was admitted by the Court and that a copy might be substituted. This was marked Complainant's Exhibit No. 5.

I don't know who received the $25,000.00 shown as a receipt in Exhibit 5, but I *think there* is a record I could find it. Latter marked Complainant's Exhibit No. 6, admitted and read by counsel. This 165,000 shares of stock was sold. I don't know by whom. My knowledge is that the directors passed a resolution to the effect that they needed money to pay off [54] the mortgage and to do the development work and offered bids on the stock. The next matter that I have of knowledge is that the company delivered that stock as per that record to the Windsor Trust Company to be turned over to the McCornick Brothers of New York and the company received, as I understand it, of McCornick Brothers of New York $25,000.00 or some such amount. I think this stock was not sold on the curb in New York; I have no knowledge, however. I don't think there are any letters showing how it was sold. I have a bunch of letters from Mr. Hiram Tyree that I have never read

(Testimony of John Janney.)

over and some of them seem to bear on the sale of the stock.

The credit memorandum of the Utah National Bank is a part of the records of the company, and reads as follows: For credit of Tenabo Mng. & Smg. Co. With the Utah National Bank. Salt Lake City, Utah. 3/16/1910.

	Dollars	Cents	
McCornick check.....			
Gold coin.....			
Silver.....			
Currency.....			
Checks.....	1000		Duplicate Badger.

Plaintiff's Exhibit No. 5 discloses that excepting this 165,000 shares there seems to have been sold only 2,250 shares additional but there have been other stock sold than those disclosed here. At this time I have a record of a gross of 66,000 shares, from which is to be deducted 30,000 or a net of 36,000 shares of stock which the company is short on account of the sales or which it has sold but I would like to check this at my leisure. These sales were made on December 16, 1911. There is a sale reported of 30,000 shares by the company. I cannot say who acted as the particular individual who sold it. The report comes from the Franco-American Bank but I only know what the record shows. The record shows that the company entered into a contract with a banking firm in France. Bernard Desouches, I think, is the name of the firm and the contract specified that cer-

(Testimony of John Janney.)
tain stock should be deposited with the Franco-American Bank and delivered to this French banking firm upon the payment of so much money. This contract was negotiated by Mr. Locker but the contract is made between the company and the French banking firm directly by virtue of the specific power of attorney in Mr. Locker. I have had correspondence with Mr. Locker since the sale of that stock reporting the sale and have the correspondence. However, there has been no report from Mr. Locker continually reporting the [55] sale of the stock. There has been a report as to the general conditions and the sale of the stock speaks for itself. The total amount received by the company since the report as contained in Exhibit 5 is $2,887.18. On July 15, $724.65, in March, 1910, $1,000.00, in May, 1911, there is an entry of $7.18 which did not come from stock sales. It was deposited to meet an overdraft, I think, These items are taken from the statement of the Utah National Bank as to the bank account. The items I have given, plus the items contained in Mr. Edmunds' report, contain all the cash receipts of the company but there is one cash receipt for $34.82 on May 24, 1911, which was made in my absence and which I will explain to-day or to-morrow. I have sent a telegram to Mr. Howard to find out about it. In reply to the question asked some time ago, the 30,000 shares have been sold to Bernard Desouches was on December 16, 1911, and on March 29, 1912, there was 10,000 shares sold, under the same contract, for 15,000 francs. On December 2, 1910, there is a

(Testimony of John Janney.)

record here which shows that 21,429 shares was paid out of the treasury against which 130,000 shares was received into the treasury on account of the French contract. I think that is all. The total aggregated 36,000 shares after deducting 30,000 shares the company has received back. To explain I will say that the laws of France, which seem to be the only place at that time at which we could finance the company, required that they look into the affairs of the company, and requires that the department of the French government look into the affairs of the company and to compensate them for that they exact a tax of $10,000.00. In order to comply with the laws of France you have to meet their requirements as to the form and nature of the securities, which require considerable expense. The printing of these securities required I think three or four thousand dollars and the issuing of them and signing of them, etc., was expensive. In that way they estimated the expense necessary to be put up by the company at something like $30,000.00. They first estimated it I believe a good deal higher than that. The company declined to put up that $30,000.00. Mr. Locker, who was representing the company in this matter, and had been to France and conducted certain negotiations and who had returned and was reporting to the company, stated that he did not know, unless the company could put up this $30,000.00, how [56] they would be able to get access to the French market; somebody had to put up the money. The matter was discussed at considerable length in board meetings and outside,

(Testimony of John Janney.)
and somebody had to put up the money and that was the reason that this company gave out this block of stock which brought in this $30,000.00, but the company not wishing to lose that $30,000.00 and not wishing to take any chance of losing it, Mr. Locker and myself gave back to the company the $30,000.00 out of our own stock so as to save the stockholders of the company in going on a wild goose chase after financing the plan in Europe. Hence, it is we deduct this 30,000 shares now on deposit in the Windsor Trust Company and to secure the company for the 66,000 shares, the total amount then due, which leaves the company out 36,000 shares.

Mr. Locker's stock, and mine, has been issued. It is a very hard thing to make clear, and unless you make it clear it is going to be very confused. We placed stock with the Windsor Trust Company, 450,000 shares and that stock is still in the Windsor Trust Company. Now, then, the Windsor Trust Company placed in the Franco-American Bank 450,000 shares and the Windsor Trust Company certified that this 450,000 shares had been deposited in the Windsor Trust Company, because the laws of France require that you circulate a security that passes to bearer and that is issued by a trust company, wherein the trust company contracts that they will deliver to the bearer of these trustee certificates the certificates of stock upon demand. At the present time there are with the Franco-American Bank 45,000 certificates which is 450,000 shares, less the amount that they have paid out which I figure here at 6,600 certificates. I think

(Testimony of John Janney.)

all of the officers of the Tenabo Mining & Smelting Company understand this transaction, and I think they all understood it at the time they entered into it thoroughly. I explained that Mr. Locker and myself out of our own holdings turned into the treasury of the company 30,000 shares of stock. We had to do that in order to make it possible to finance this company. So that the sales of stock since Mr. Edmunds' report is 36,000 odd shares, that is what I estimate. I asked for thirty days' notice to come back here and fix up the records of this company, and I have been brought here into this court from the east on such short notice that I could hardly get away, and we really should not come into this trial now but we are forced in here because we [57] cannot get a reasonable time to fix these things up. I have been in the east in the interest of the company.

The thing I make the calculation from is the deposit book in the bank, and from the statement of the bank, and from the letters. The company owes Mr. Locker, I assume the amount stated in that statement of Mr. Edmunds which is $902.00 of which $50.00 has been paid. That is the amount that is stated to be due Locker on an account between Locker and the corporation. Locker was entitled to a credit from the company for railroad fare, Pullman, meals, etc., trip to Tenabo, R. W. Rogers, Duncan MacVichie in December, 1908. $158.30 R. W. Rogers, services in examination and report, $100.00. The items I am reading here are contained in the Locker credit. I have no books or statement

(Testimony of John Janney.)
except the minute-book, showing in detail the amount that the company owes. The minute-book shows in detail the $8,000.00 odd that the defendant in its answer states that it owes.

The company has an encumbrance, I think, of $1,000.00 to Mr. Shearman. It is secured by a mortgage which has been extended to May 16, 1913, by written extension. There is no other encumbrance on the property that I know of. There is a matter that was a cloud on the title of the Gem Company which conveyed its property to the Tenabo in the nature of a lien called the Seaman lien, which I have no personal knowledge of, but which the Tenabo Company may have to pay. I don't know what the status of it is. Mr. Price, the attorney for the Gem, told Mr. Smith, the attorney for this company, that that matter had been settled and disposed of. We are not concerned about that because it is a matter that belongs to the Gem Company to pay, and we believe that they are responsible and can pay it. We proceeded on the theory that that lien had been disposed of as reported by Mr. Price. There is no other lien on the property that I know of. I never heard about the claim that one Adsit has to go into the property and took out ore to satisfy an obligation that he has against the company. I heard of—whatever it was, given to Mr. Adsit by Mr. Tyree as president of the Gem Company to secure the advance that Mr. Adsit made to assist in the consolidation of these companies. Since I have been an officer of this company I never heard anything being done by this

(Testimony of John Janney.)

company which would tend to cast the burden of paying that debt on one company rather than the other. [58] There is nothing in the record which shows the Tenabo Mining & Smelting Company has ever assumed the obligation of the Gem Company and there is nothing in the record about that obligation that I know of and I don't think there is anything. Mr. Adsit, of New York, was interested extensively with us in our Tenabo Consolidated Company which merged with the Gem Company. His son was superintendent of the property before the merger. He was a stockholder in the Tenabo Consolidated Company and he knew conditions. Both of them were very much interested in the success of the corporation. At the time when in order to make a success of a merger which was talked of between the two companies we needed a sum of money to take an engineer from Boston to this property to make an examination—which report of the engineer was supposed to be satisfactory to some people that Mr. Locker had been in negotiations with to finance the mine. Now, in order to get that engineer up there and in order to get all things done that had to be done, we had to get some money and we thought of turning to Mr. Adsit, and we went to him and explained what we proposed to do. A paper was drawn up by Mr. Tyree which was signed by the Gem Consolidated Mining Company by Tyree, President. It was also signed as well as I recollect by the Tenabo Consolidated Mines Company by P. B. Locker and endorsed by Mr. Locker and by me personally. The

(Testimony of John Janney.)
money, $5,000.00, was not paid over at the time that note was drawn but we were all there and we perhaps would not be there again, so these papers were drawn in case Mr. Adsit should decide to put this money in. I have a recollection of Mr. Tyree signing some kind of a paper binding the Gem Company to let Mr. Adsit have the ore reserved as security. Now, Mr. Locker and myself together gave certain land that we had as security. We offered Mr. Adsit a bonus of our personal stock if we should succeed in forming this company which we didn't know whether we would or not, so that Mr. Adsit, not knowing that this company would be made at all, was taking this security and the papers were drawn in that way. It was assumed at the time of the signing of those papers that Mr. Tyree would be able to secure the ratification of his company and that Mr. Locker would be able to secure the ratification of his company to that transaction, and Mr. Adsit, in advancing [59] the money before that ratification was made, realized that he was taking that chance because he knew that the ratification of the companies had not been made. Mr. Adsit, after deliberating and considering the matter for some time, finally made an advance of $2,500.00 and the rest of that is hearsay from that on. That $2,500.00 came into the Tenabo Company. I remember a meeting of the Board of Directors where they ratified the transaction as far as our part of the transaction was concerned. Ratification was made by the Tenabo Consolidated Mines Company before they merged and

(Testimony of John Janney.)

formed the Tenabo Mining & Smelting Company and the whole transaction took place with this merger in view. I did not even know that we would be able to effect it at that time. As near as I remember, the document marked Complainant's Exhibit 7 is the agreement effecting the Adsit deal.

Recess until 2 o'clock P. M., after which court resumed session.

JOHN JANNEY, direct examination continued.

The total amount of cash received from the sale of stock as I make it is $34,750.68. These figures have been hurriedly compiled and it is a lot of work to go through these. We have data but to do this kind of work is a thing that takes time.

There is some money the company has got for which it has not yet issued stock, so the $34,750.68 represents the sale of stock, all of which has not yet been issued.

The company owed $750.00 on account of the Shearman mortgage and a reasonable attorney's fee to the attorney in this case, which is a retainer of $500.00 and a fee of $50.00 *per diem* for the time employed, the expenses of the attorney, except that if the attorney is here on account of Gold Quartz or other matters, that the expenses do not attach. That is the understanding with the attorney of what a reasonable attorney's fee is and is to be in full compensation for their services in this case. In addition to that the company owes on account of director's salaries $7,000.00, from which item must be deducted the amount that has been paid to date. From

(Testimony of John Janney.)

March 18, 1910, to May 15, 1911, 14 months, there have been five directors. There has been paid $1,700.00 to the directors, which leaves $5,300.00 still due. We owe Ferry $1,200.00; there was a tacit understanding among the [60] directors that this money was to be paid, if at all, when the company is in a position that it can conveniently do so. It owes John Pingree $800.00 and it has paid him $200.00. It owes Ferry $1,300.00 and has paid him $200.00. It owes Benner X. Smith $1,300.00 as a director. Mr. Howard $1,300.00, me $1,100.00. They owe Stephens, Smith & Porter, the attorneys for the corporation, for their services on which two payments have been made, I should judge less than or about a thousand dollars. I don't know just what they do owe them. Mr. Ferry became a director and rendered the company services. He saved this company from being wrecked by a lot of highbinders and blackmailers and people who were conspiring to wreck the company, and it took a substantial man with a good name and of immense ability to cope with these conditions that have been arising continually. Mr. Ferry attended directors' meeting throughout the month of March and at intervals of time that were frequent, which I cannot recall how frequent but they seemed to me nearly every afternoon. We simply made a record of such meetings where we adopted a resolution but did not make any record of meetings where we met together. Some were not formal meetings, and in connection with Mr. Ferry, I am referring to both. In March, 1910, I

(Testimony of John Janney.)

count 3 meetings, and he attended informal meetings, of which we have made no record. I see no meetings in April, May or June; July 1, August 1, September 2, October 2, November 2, December 2, January, 1911, none, February 1, March 1, April none, May 1, June 1, July 1, August 1, September none, October none, November 1, December 1. No other meetings were held until April, 1912, when one was held. The next meeting is in June, 1912. Mr. Ferry was generally present. He attended a great many other meetings than those for which there is a record in the minute-book. Mr. Smith was the attorney for the company and we submitted to him these contracts and he advised the board. Mr. Pingree did the same as Mr. Ferry in the way of directors' meetings while he was a director, but he was not a director during the year 1912. Mr. Skeen asked to be put on the board and we were willing to put him on but he did not qualify. Mr. Smith was on the board and attended meetings regularly. He was at all the meetings, I think. He was paid for his services as attorney and I suppose that would probably be deducted. I [61] would like to add that there is not a man on this board who is going to ask for the payment of this money provided under this resolution unless at the time he takes it he thinks it is due him. I know personally I won't, and I believe the rest of them are in the same position. It was voted by the Board of Directors and has been carried along as an obligation. I will file a renunciation right here that I don't want any salary as an

(Testimony of John Janney.)

officer of this corporation or any other corporation that I do not deserve and do not earn. They owe me $1,100.00 but they will never pay me any of that amount that I have not earned. They owe Mr. Smith $1,300.00 under the resolution and they also owe his firm as attorneys for special services. Mr. Howard did not perform any services except as a director. He is a banker. Mr. Ferry has mining interests. Mr. Pingree is a banker. Each is actively engaged in the work of their respective lines of business. A bill was presented by myself and Locker as shown by the minutes of the company under date of September 7, 1909. The minutes read as follows:

"Mr. Janney presented a bill for expenses aggregating in the sum of $2.082.75. Upon consideration it was ordered that the charge of $1,800.00 made for office rent and expenses of Locker & Janney for the year ending December 31st, 1909, and the charge for a city directory of $6.00 be denied as not proper charge against this company; and that the charge for stock certificates of $105.00 and for the corporate seal of $2.50 be denied, the same having been heretofore paid by the company."

I want to say that I think there is a decided mistake in that, at least I have an impression at the time I was very much irritated by it. There was a misunderstanding. I cannot be sure that it was presented for that amount. There was a bill presented but whether that is an exact reproduction of it or not I don't know. I know that that is not a

(Testimony of John Janney.)

correct showing of that bill; there is a misunderstanding and misstatement in there somewhere of the bill that I presented. Minutes of the Board of Directors of the Tenabo Mining & Smelting Company held on November 27th, 1909, is about the time the bill was presented. The minute was offered in evidence and read as follows: "Minutes of meeting of Board of Directors of Tenabo Mining & Smelting Co. held pursuant to notice Nov. 7th, 1909. Present H. P. Clarke, C. S. Varian, L. D. Freed, H. C. Edwards and R. T. Badger. [62]

"It was moved by Mr. Varian that bill of McCornick & Co. for note of Gem Consolidated Mining Co. together with interest thereon, including attorney's fee, etc., which amount to $18,860 should be paid; seconded by Mr. Freed, and carried.

"It was moved by Mr. Edwards that Mr. C. S. Varian bill for salary as attorney and incidentals amounting to $700.00 be allowed and paid. Unanimously carried.

"It was moved by Mr. Varian and unanimously carried, that secretary's salary for 11 months amounting to $550.00 be allowed and paid.

"It was moved by Mr. Edwards duly seconded and unanimously carried, that Mr. Clark and Mr. Freed be paid 11 months' salary at $50.00 per month for extraordinary services rendered to the company.

"On motion duly seconded, the president was empowered to employ Geo. Weston to superintend assessment work on properties at a salary not to exceed $5.00 per day. Carried.

(Testimony of John Janney.)

"It was moved and carried that taxes for 1909 be paid. Bill of Locker and Janney, amounting to $2,082.75 was presented to the Board, and on motion filed.

"On motion duly seconded, and unanimously carried, bill of Mr. C. S. Price amounting to $163.30 for patenting "Two Widows" claim was ordered paid.

"There being no further business, meeting adjourned. R. T. Badger, Secretary."

The bill of Locker & Janney, a part of it, I think, they owe and a part of it they don't owe. That is a very complicated matter. That bill includes a lot of time as well as I remember it. There was $3,687.50, the amount of this bank statement of the Utah National Bank shows deposited from Mr. Locker. The trust company shows that there has been issued against that 2, 200 shares of stock. That may be an item that enters into that account because it would show that Mr. Locker had deposited a great deal more money that the stock received because the showing is that he has received only $1,350.00 from the amount so deposited. Minutes do not show what the items of the bill were. I want to say now that that minute is not correct. For instance, just to show you that the amount put there for a [63] directory is for putting the name of the Tenabo Mining & Smelting Company in the directory and it wasn't a bill exactly presented to the board, it was a matter presented to the board for them to pass upon, whether they thought the company should pay it. And the office rent was simply this, that the affairs

(Testimony of John Janney.)

of the Tenabo Mining & Smelting Company have to have some office and there was a lot of typewriting and stuff in our office, and when we distributed the expense of our office among the various items, we thought it ought to be divided among us, we simply submitted it to the Board of Directors and I forgot the items—and I remember that resolution there is something that gives an entirely wrong impression. Now, if that is true, what the company actually owes us under the head "office rent" is absolutely disregarded, because it was simply a matter put up to the company to determine whether or not they should pay it, that was all there was to it. As I understand the matter, they do not owe any of that to us now. There may be something there that they owe but I don't know what it could be. There is a claim that Mr. Locker will probably have when the balance of this account is shown here. There is nothing they owe me that I know of. They owe Mr. Locker a fair settlement on this stock; he collected certain money from certain stock and there was entry made in the book of a deposit of the money. The stock had not yet been issued. When the time comes for the directors to take that matter up and adjust this statement will be something of a guide of what the company will pay him, and I would say as a matter of opinion that the company owes him $902.00 on this. I cannot think of anything else. I think there is no officer of the company who has any data upon these matters other than myself. Mr. Howard had the bank-book that you see and Mr. Ferry had the

(Testimony of John Janney.)

bundle of papers containing the stock certificate book, not in his custody, but they were available to him. A man by the name of Jones had them and it practically amounted to the same thing. By the resolution of November 27th, $700.00 for salary to Mr. Varian, according to Complainant's Exhibit No. 5, as attorney was allowed and paid. I assume that that contains the monthly salary plus services which he rendered in some cases. I assume that he will correct the statement if I find that it does not. Mr. Varian's statement shows. November [64] 27, to services $550.00, January 1 to November, both inclusive, 11 months; to services in Lloyd Seaman vs. Gem Mining Company, $50.00; C. C. Wylie and others against Tenabo Mining & Smelting Company, to services in the above case, $100.00; total, $700.00. The record shows that according to Plaintiff's Exhibit 5 the sum of $1,025.45 was paid to H. C. Edwards for attorneys' fees. Mr. Edwards was employed by Mr. McCornick to foreclose that mortgage and when the mortgage was paid the amount of the mortgage was paid to McCornick without including an attorney's fee and the attorney's fee was paid to Mr. Edwards. Mr. R. T. Badger was paid $650.00 as a director of the company; Mr. Clark was paid $550.00 as president; Mr. Lester D. Freed $550.00 as a director. I don't know what services Mr. Varian, Mr. Badger, Mr. Clark and Mr. Freed rendered to the company other than that for which they were paid a special compensation. There are 29 pages in this book that are the records of the proceedings of

(Testimony of John Janney.)

the first Board of Directors. The assessment work has been done on a part of the claims for the year 1912. On the Ollie and Reno, which is the Gem group, we have spent a good deal more than the assessment work. On the others we have not done any. There are twelve claims and the amount of assessment work is $100.00 per claim. Two of the claims are patented. The assessment work must be started before the end of the year; the performance can run into the next year. The book which you hand me which purports to be the register of stock of the Tenabo Mining & Smelting Company is a copy of the book kept by the Union Trust Company. We have never made up a ledger account with any of these concerns. I think we have paid the Windsor Trust Company $459.85. That is the amount paid for being registrar of the stock. You have to have an absolutely responsible institution as a registrar of the stock, because they are responsible if your stock issued is more than your books show and you have to have somebody where you are handling stock that you hope to be valuable that is responsible. Now, they charge for that responsibility. The amount for making a copy of that book was $10.00. Here is a bill for $8.10 for putting through 162 certificates. They charge 5 cents per certificate for the work, so that nearly or practically all of it is for their responsibility. The book which purports to be a book kept by the Windsor Trust Company is a record of the original transfers [65] of the Tenabo Mining & Smelting Company made by the Windsor Trust

(Testimony of John Janney.)
Company. I cannot say just what we have paid this company at this time. There has been an employee who has kept the vouchers, a typewriter, bookkeeper or whatever you want to call her. Just a clerk. The amount we have paid her is $100.00; that is also for a lot of typewriting, writing up those minutes and the correspondence of the company largely done by her. Her name was M. B. Robinson. When we open books in our office we have an expert bookkeeper come in. The directors never voted to open books. We have a copy, though, of all of the records. This M. B. Robinson was a clerk in the office of Locker & Janney. She was in our office five years and left, I think, in October last. I think I told her before she left the office to make a record complete of everything that she could see, whether the records balanced up or not. When a check was issued she would write out a voucher and pin it to the check, and when a check was sent through the voucher would be signed. She did that part of it.

We have made reports to the Attorney General of this State, one November 30th, 1910, and the statement of May 31, 1911. I have copies of these reports and of all made to the Attorney General. To the best of my belief these reports were mailed by Miss Robinson to the stockholders. There were about 250 stockholders, I guess. (Report admitted in evidence and marked Plaintiff's Exhibit 8.)

The report you hand me rendered in 1911 was in the same way mailed to stockholders and filed with the Attorney General and with the County Recorder.

(Testimony of John Janney.)

I don't know whether one was made before 1910. That was when I became a director. There is nothing in the minute-book which shows with reference to the statement of 1909. (Statement of May 31, 1911, admitted and marked Complainant's Exhibit "A.") A copy of Complainant's Exhibits 8 and 9 were mailed to the stockholders. I could not say as to whether I superintended the mailing of all of them. I am quite confident that Miss Robinson mailed some of them, and I remember taking a big bundle of them down once or twice. I have no doubt that she did some of the time mail some of the reports. I saw her writing them up and I am morally certain that they were mailed to all of the stockholders, subject to such oversight as anyone is liable to make in going over a list of stockholders. [66]

Mr. Hiram Tyree, Mr. Locker and myself were not the only ones who had the agency of this stock, because the agency was not given by the company. The agency was given by Mr. Locker and myself to sub-agents at the time we had contracts. I think you could consider the French contract as the bank being an agent from the company. The contract runs from the company to the bank. There was no other agency than those three, unless you call that 165,000 shares an agency. That was a submit for bids for the stock.

Now, if McCornick Bros. bid on that—if that is in fact the case, and you want to consider them as agents they are the agents—but I would say not. I would say there were none others than Mr. P. B.

(Testimony of John Janney.)
Locker and the French bank subject to the provision that Mr. Locker has associates and I know of none. (Various minutes of the Board of Directors found on pages 29 to 91 were offered and received in evidence.)

WITNESS.—A great many things have been discussed in meetings but everything that this corporation has finally adopted is there in that minute-book. The following resolution was discussed and threshed out but was never finally adopted.

"Whereas, large sums of money are being expended by P. B. Locker in the work of financing the treasury of this company by the sale of treasury stock in Paris, France, $4,368.57 being the Windsor Trust Company bill for printing French bearing certificates, of which $2,000 has been paid; $1,310, $610, $410 bills for services of Vice-Presidents and Assistant Secretaries in signing 45,000 certificates; French taxes and dues approximating $10,000 Trustee fee to Windsor Trust Company $3,000; also attorney's fees for legal advice in Paris, and sundry other incidental expenses; and

"Whereas, this company is not paying any part of these expenses but is receiving the benefit therefrom and is therefore interested in the success of negotiations which require expenditures of large sums of money on the part of said P. B. Locker, and

"Whereas, said Locker has advised this company that he can secure a loan from the French Bank upon his note, provided he can secure the issue of 50,000

(Testimony of John Janney.)

shares in French bearer certificates, and has asked for a loan of the same, offering to secure this company by 70,000 shares of stock of this company which is owned by him and associates; [67]

"Now, therefore, be it resolved that this company loan to the said P. B. Locker, 50,000 shares in French bearer certificates for a period of six months, upon the deposit by the said P. B. Locker with the Windsor Trust Company, to the credit of the Tenabo Mining & Smelting Company, as collateral security of 70,000 shares of stock of this, the Tenabo Mining & Smelting Company upon the condition that the consent to the loan of said 50,000 shares in French bearer certificates be obtained from Mr. Bernard Desouches, 148 Avenue Malakoff, Paris, France, and also from the members of the Underwriting Syndicate, with whom this company has contracts relating to the said stock; and

"Resolved, that this company authorize the payment of $25,000 to the order of P. B. Locker from the money deposited in the Franco-American Banque to the credit of this company, for the sale of the first allotment of 150,000 shares of stock, not, however, until the entire allotment of 150,000 shares aforesaid has been paid for in full, and upon condition that the said Locker deposit with the said Franco-American Banque, 50,000 shares of stock of this company as requested, by five thousand French bearer certificates of the denomination of ten shares each, heretofore loaned to the said P. B. Locker by Tenabo Mining and Smelting Company, for the pur-

(Testimony of John Janney.)
pose of providing funds for expense, and so forth.

"Resolved that the Franco-American Banque be, and the same is hereby authorized and instructed to turn over to the order of P. B. Locker of the Hotel Chatham, Paris, France, and Mr. Bernard Desouches, party of the second part in a contract authorized by resolution adopted March 5th, 1910, five thousand French bearer certificates of the denomination of ten shares each, upon the deposit of the said P. B. Locker with the Franco-Americane Banque, or with the Windsor Trust Company of New York, or part with one and part with the other, a total number of shares which will aggregate 70,000, said shares to be deposited to the order of the Tenabo Mining and Smelting Company."

Mr. Smith, as counsel of the company, drew this and advised us on it. I cannot tell why the board did not vote upon it. The matter may have been under consideration a few days, but it may have been longer than that. At [68] several meetings they discussed it. It was written on a loose sheet of paper and was, I think, afterward destroyed.

"Such a resolution was written up on a piece of yellow paper. The directors discussed it and Mr. Smith has spent a good deal of time in drawing it. I told Mr. Skeen that this resolution had been approved. A few days after that the whole board met with Mr. Skeen and it was explained to him that the resolution had never been finally adopted. It was something we had discussed and given careful consideration to, but is not anything we finally adopted.

(Testimony of John Janney.)

Everything that was finally adopted is there in that minute-book. I do not think that was a minute. I think there were two or three things all jumbled together on separate sheets. There was a minute of the board held on February 6th, 1911. There was some matter presented on a yellow sheet of paper for the meeting to consider. Whether it was written afterwards I could not say. We did not have our minutes written up in detail, putting down the date of the meeting and who were present before the meeting was called. I account for this particular sheet bearing date February 6th, 1911, by the fact that we might have had a meeting on that date. The meeting with the members of the board in Mr. Skeen's office, bearing upon these matters, may have been after Mr. Skeen had brought the original suit. That resolution was never finally adopted by the board. The board did meet and consider the resolution, and in the sense that when they considered it and talked about it, they acted on it. They did act upon the resolution and thrashed out the details of it and spent a good deal of time on it, and Mr. Smith, as counsel for the company, advised on it, he drew the resolution himself. It was never submitted to Mr. Skeen; it happened to be a piece of paper in the minute-book at the time he came into the office to examine it. When he was examining it he said to me: 'Is this one of the minutes?' and I said: 'That is a thing that has been passed upon by the board, or that is a matter that has been approved but never finally adopted.' I meant the form of it had been approved by Mr.

(Testimony of John Janney.)

Smith. The board considered it, but I do not think they ever voted on it. The terms of this resolution were first brought to the attention of the board sometime prior to that date, possibly a week or longer before that date, and [69] during that week they had thrashed out the terms of the resolution. The typewriting of it was done in my office, as the result of the action of the board, they having discussed it at several meetings and thrashed out its terms. The details of it had been agreed upon by the board at previous meetings. The board of directors is not in the habit of thrashing out and agreeing upon the details of resolutions and then not paying any attention to them after that. The sheet of paper upon which this resolution and these minutes were written, I never saw again after the 1st of March. I may have thrown it into the waste-basket. I have no recollection what became of it. No one told me to throw it away. No one of the board of directors told me to destroy it. It is not my habit or custom of taking resolutions that have been formally discussed at previous meetings of the board of directors and agreed upon in detail and write them up and then subsequently destroy such resolution. I did discuss the matter with Mr. Ferry and Mr. Smith informally after the resolution was written up. Mr. Ferry is president of the company, and without any directions from him or anyone else I destroyed this resolution. There was a meeting of the board on February 8th, 1911, relating to the Locker contract. I do not remember whether at that meeting there was any dis-

(Testimony of John Janney.)

cussion of this resolution. Mr. Locker and I are jointly interested in his work under the French contract. Nevertheless, I do not recall whether anything was said at the meeting of the board on February 8th bearing upon the matter of readjusting my relations with Mr. Locker whereby he was to obtain $25,000.00 under the conditions set forth in the resolution." (Tr., pages 104–117.)

Saturday, Sept. 7, 1912, 10 A. M.

JOHN JANNEY, direct examination continued.

Our minutes were made up of detached leaves and sheets but the pages could not be changed around without showing there had been a change. The minutes of February 6th, 1911, showing the resolution which is above referred to, were prepared about that date. That was the date we had the minute meeting, I suppose, and the resolution was perhaps prepared before the meeting. Mr. Skeen came to my office and asked for the minute-book [70] and I handed him that book. On a yellow sheet put in that book along with some other things was this resolution. It was something about February 13th. Mr. Skeen called several times thereafter to examine the same book. I don't know whether the loose leaf was in the book. I see from the book that there is a meeting on February 8th and not another until May 3d, so the chances are that I did not look at or do anything with the minute-book between those dates. I remember Mr. Skeen calling at our office with Mr. Cramer to make a copy of the minutes of our meeting. I think it was along in April. Now

(Testimony of John Janney.)
at that time I handed Mr. Skeen our minute-book and I think it contained that piece of paper, the yellow leaf or sheet. Mr. Skeen may have come again to examine further the minute-book the middle of May. I do not recall. Skeen called at my office several times and each time I handed him the same book with the same papers in it. I remember calling at Mr. Skeen's office a number of times after the filing of this suit. I remember calling in company with Mr. Howard, Mr. Smith and Mr. Ferry, and meeting in Mr. Skeen's office Mr. Mallet and Mr. George Kimball, but could not say whether it was before or after the filing of the suit. At that meeting, Mr. Skeen made a statement referring to this resolution as though it had been adopted. He stated in effect to me that, in effect, at that meeting, that I had told him that resolution had been adopted. I said: "Now, Mr. Skeen, I am going to handle this matter vigorously. When you asked me that question I told you that that resolution had been approved, but it has not been finally adopted." These were my words.

I don't remember when I wrote up the minutes of the meeting of February 8th, 1911. We wrote up the minutes of the meetings generally before the meeting was held. We usually wrote up what business we wanted to submit to the meeting and then when we went to the meeting we considered that business. We would almost always prepare a resolution, so as to present the matter to the board in the form of a resolution. Then they had something definite and

(Testimony of John Janney.)

concrete to act upon and the proposition was presented in a way that it took less time to consider it. That was the usual method. I can give you no idea as to whether the minutes of February 8th, 1911, were prepared before or after the date they bear. I paid no attention to that loose sheet bearing the purported minutes of the meeting of February 6th. I couldn't remember anything about it. I might have left it in that minute-book six months. I might have thrown it into the waste-basket the last time [71] when Mr. Skeen saw it.

Q. Did you ever at any time state to Mr. Skeen or to anyone else interested in this litigation that the purported minutes of February 6th, 1911, were not copied into that book?

A. I do not remember, but I may have said it.

Q. Well, what is your best recollection, did you ever state it or not?

A. I do not remember any conversation on the subject.

Q. You never attempted to bring to their attention the fact that there had been any change in the record that you submitted to Mr. Skeen for examination, did you?

A. I would like you to make that question clearer, it is a little obscure. The ambiguity is whether I told Mr. Skeen that there had been any change in the record.

Q. Did you ever bring to his attention that the yellow sheet that you submitted to him was not still in the minute-book?

(Testimony of John Janney.)

A. I do not remember ever calling his attention to that, and I do not think I ever did. It is not my habit as secretary to eliminate from the record matters relating to important transactions, which have been considered by the members of the board, the details of which have been worked out by them and have been approved by them separately, so long as there is any chance of their ever becoming an act of the corporation. I did not consider it of any importance. (By-laws of the defendant corporation admitted in evidence and marked Complainant's Exhibit 10.)

WITNESS.—I have a copy of the prospectus that was issued in France, but have not the English translation of it. There are letters there about that particular prospectus. These prospectuses, which are the subject matter of consideration, and recorded in the minutes of Tenabo Mining & Smelting Company, on June 12, 1911. (Prospectus admitted and marked Complainant's Exhibit 11.) As secretary of the company, I have been informed to what extent Mr. P. B. Locker has exercised the authority given him by the Board of Directors in the power of attorney which has been recorded in the minutes. I have been informed by letter. Mr. Locker had an attorney in Paris write to the corporation. I gave you the letter yesterday. I have never made any personal examination to find out whether he has executed more contracts or any number of contracts under that power of attorney. I have reports here that will show to what extent he has proceeded. It would be

(Testimony of John Janney.)

impossible [72] for me to know the full extent to which he has proceeded.

Referring to the number of stock certificates: There appears to have been 15 volumes. "A" to "Q," inclusive, are all of the certificate-books that have been signed up and sent to the Trust Company. Two others were printed and are in the office in Salt Lake. I did not produce them here. The certificates were printed wrong and they have never been signed up, and were thrown aside in a lot of rubbish on a table with some other things and there they are. There are 250 certificates in each book. The form of certificate submitted is Exhibit 4, attached to the deposition of Mr. Ferry is the form that was used with an explanation, viz., that some of the certificates are printed with the number "100" lithographed in the blank space for the number of shares. I also want to add this: That the "Carnegie Trust Company" was printed in the first two books that this company has printed, on the left-hand margin. As well as I remember, about half of that book had printed in the body of them the number of shares, to wit, 100. They are there and the records will show. Referring to the stub No. 105, Book No. A: It was issued for 100 shares to Robert Murphy and registered by the Union Trust Company, July 26, 1910. I do not know when it was issued. The record does not show that. This information I am getting from the transfer agent and our registry agent. Referring to stub No. 107 (?), it shows that the certificate was not issued. It shows on the stub

(Testimony of John Janney.)

"Void. Not issued." Referring to certificates 110 to 129, inclusive: I know the system of the Trust Company to be that a blank stub is considered by the Trust Company a ditto mark. Therefore, I suppose you can answer it that way. Now, I would like to make an explanation. These trust companies, instead of charging 5 cents for transferring one of these certificates, they could make these records so that they would have to charge 10 or 15 cents. They have gotten this matter down to a science. Referring to stubs 131 to 152, both inclusive: I cannot say whether these stubs disclose to whom or for what amount the stock was issued. The stub being blank amounts to a record that the stock was issued to Robert Murphy in the sum of 100 shares, referring to the last recorded stub. That is the method of the Trust Company in entering stock. I have no record in the office to this effect. Stubs 158 to 168, inclusive, do not disclose to whom and for what amount the stock was issued. [73] Same explanation. Also stubs 170 to 204, inclusive. From the stub, I would judge certificate 107 was issued to Otto Spa, but I would have no way of knowing except by reference to the Trust Company's books. I would give the same answer to numbers 172 to 204, inclusive. I do not know of my own knowledge where or by what authority these certificates were issued to Otto Spa. Stock book B I would judge is one of those that I have at home, from the fact that it is not listed on the Trust Company's certificates, and also the stock book marked "C."

(Testimony of John Janney.)

I do not know where the certificates came from or whether there was in fact any certificates cancelled and surrendered, which formed the basis of the reissuance to Otto Spa.

Referring to stub numbers 1039 to 1200, both inclusive, Book "D," I cannot state if these stubs disclose to whom or for what amount the stock was issued. They are in blank. I can look at the record of the Trust Company and tell, but as secretary of the defendant company I have no record to that effect.

Stubs 1456 discloses 500 shares issued to H. Tyree; stubs 1457 to 1460 both inclusive, are blank.

Referring to Book "E," stubs 1460 to 1500, both inclusive. They are in blank. Also stubs No. 1502 to No. 1750: Book "F": They are in blank. Referring to Book "G," stubs 1752 to 1950 are all in blank. Also 1957 to 1960. 1961 shows 4,000 shares but no date. Referring to Book "H," certificates 2002 to 2021, both inclusive, are subject to the explanation formerly given, and when I refer to this explanation, I refer to the records of the Trust Company. I regard the Trust Company as our agent. I have never asked for copies of these records until the time of this trial. We have never had any occasion for them. Stubs 2034 to 2036, both inclusive, are blank, and 2043 to 2141 all appear to be blank. 2143 to 2193 are blank. 2197 and 2198 are blank. 2200 to 2241 are blank. Also 2246 to 2250. It has been the custom for the President to sign the certicates in blank and they are put in charge of the

(Testimony of John Janney.)

Express Company and directed to the Trust Company. At whose request and upon whose order they are checked out depends entirely upon whose stock is going to be checked out. If it is company [74] stock, it is checked out on the order of the company; if some individual stock, it is checked out on the order of the individual who can present the certificate for transfer. There are two certificate books that I refer to above from which there are no certificates taken. These are the two certificate books I count as void. They are not usable. We have in the stock certificate books some certificates that have not been used.

Cross-examination by Mr. ASHTON.

I am now living and have lived at Twin Falls, Idaho, since 1906 or 1907. I was an attorney at law until I began with these mines. I am engaged now in developing mines; have been since 1907. I have been associated with this defendant company and I have been associated with the Tenabo Consolidated Mines Company and with two companies that have properties in Pioche, Nevada. I have known Mr. Locker since 1893. We were at college together from '93 to '96—college chums. Have been associated with him in the mining business. I think we began in 1907. The circumstances that attended our forming a relation was, I was in Mr. Locker's office on a personal visit, and at that time he was manager of one of the departments of the Continental Life. Mr. A. E. Raleigh came into his office to talk to him about a piece of mining property, and

(Testimony of John Janney.)

Mr. Locker said to me: "John, go out and talk with this man and see what you think of the proposition he has got." We did not at that time enter into a partnership. From that point it just drifted on. Our equal interests dictated and we proceeded to make a success of the mine if we could. We gave a lot of consideration to the question of how we should conduct our operations. We mapped out a policy where we tried to differentiate ourselves from any objectionable methods in this business, and we resolved that we would accept no salaries in companies where they were not on a self-sustaining basis, and that when we went out to promote the interests of the corporation by the sale of stock or otherwise, that we should act from the viewpoint of the stockholder, because of our interests in the stock, and that we would not accept commissions on stock sales. That was a policy definitely adopted. That policy persisted up to the time the Tenabo Mining & Smelting Company was organized. Then it was changed. Conditions in the Tenabo Mining & Smelting Co. were unusual and peculiar. The reason was this: In proposing the consolidation of these companies, Mr. Tyree [75] seemed to think that he was doing a work of value for his corporation and his stockholders, and he seemed to think that he would be accorded a commission or a promotion fee in stock, and that led to a contract between Mr. Tyree on the one hand and Mr. Locker and myself on the other, whereby it provided for that commission of stock. We merged the property of the Tenabo Con-

(Testimony of John Janney.)
solidated Mines Company with the property of other people who had different policies. The Tenabo Consolidated Mines Company controlled the Two Widows Claim, the Two Widows Extension Claim, the four Copper Hill Claims, and it controlled possessory option rights on the Nevada Phoenix Group of four claims. These properties were controlled and owned by corporations. I owned stock in the Tenabo Consolidated. I think Mr. Locker and myself owned 300,000 shares. The property owned by that corporation was turned in to the defendant corporation. No promotion fees or commission were allowed or asked for by Mr. Locker or myself. None was ever received. The 300,000 shares of stock that came from the Tenabo Mining & Smelting Company to the Tenabo Consolidated Mines Company in payment for their properties all went into the treasury of the Tenabo Consolidated Mines Company for the benefit of the stockholders. Those who were the first directors of the defendant company were H. P. Clark, C. S. Varian, Lester D. Freed, R. T. Badger and H. C. Edwards. We accepted no fees whatever for the consolidation, and at the time of this contract with Mr. Tyree, which provides for that fee, Mr. Locker and myself definitely and positively had a conversation on that subject. We decided we did not have to retain that, and could put it into the common fund, and by so doing could do more for our company than we could otherwise, and we definitely agreed at the time of that that what we got should go into the common

(Testimony of John Janney.)

fund. I am now referring to the Tyree contract filed in the case. Mr. Clark is President of the Merchants' Bank. Mr. Edwards and Mr. Varian are attorneys at Salt Lake City. Mr. R. T. Badger is cashier of the Utah State National Bank, and Mr. Freed is a merchant in Salt Lake City. This list of the first Board of Directors was submitted to the Board of Directors that considered this consolidation, but I do not know how they reached the agreement as to who should be the first board. I might have tacitly consented to the selection. I was away from Salt Lake, and I think these men were all selected when I got back, and I just asked Mr. Locker [76] who they were, and I might have talked a little about it, but I do not recall it. I didn't say anything to them about procuring the services of these men. There was some talk about the character of the men necessary for the new directorate. We decided under no circumstances would we consider a merger with these people unless we could agree upon a Board of Directors of responsible men that we could rely on. The object was to protect the stockholders. I believe they were all well calculated to do that work. At the time the first contract was made, called the Locker contract, I was not connected with the company in an official capacity.

Saturday, Sept. 7, 1912.

AFTERNOON SESSION.

JOHN JANNEY, redirect by Mr. SHANK.

I find the amendments to the by-laws, pages 32 and 86 of the minute-book. They are the only

(Testimony of John Janney.)
amendments. (The amendments to the by-laws as the same are found on pages 32 and 86 are offered in evidence.)

WITNESS.—You have given me entirely too much for the time I had. I went through the letters in the company file that Mr. Locker and I have; the letters that relate to the exercise of power of attorney. I won't say they are all, because necessarily in my hasty search I have done the best I could. I am sorry I have not been able to do more. I have examined the record to ascertain whether there was a report filed with the Attorney General since May 31, 1911, and I find no report. I don't know about Mr. Ferry's and Mr. Smith's record, nor about the Attorney General's. (List of certificates missing marked "Complainant's Exhibit 12.")

WITNESS.—The letter dated "Paris, November 29, 1910," is from Mr. Locker, who had power of attorney from the defendant company. I was secretary at that time. (Letter admitted and marked "Complainant's Exhibit 13.") A letter bearing date December 5th, 1910, is also from Mr. Locker. (Letter admitted, marked "Complainant's Exhibit 14.") This letter dated April 7, 1911, was received by me, through the mails, from Mr. Locker. (Letter bearing date April 7, 1911.) [77]

This letter is written on the letter-head of the company with French designation, Salt Lake City, U. S. A., then Salt Lake City in English, the Paris address and the cable adress in Paris. The company had a letter-head in this country which were used

(Testimony of John Janney.)

in our communications in our work, and Mr. Locker used it in Paris. He had in his office for general use the letter-head of the Tenabo Mining & Smelting Company. Was received by me through the mails from Mr. Locker. (Letter bearing date April 7, 1911, marked "Complainant's Exhibit 15" for identification.) Letter from P. B. Locker to J. J. Janney, dated June 9th, 1911, marked "Exhibit 16." Letter from P. B. Locker to Tenabo Mining & Smelting Company, dated June 20th, 1911, marked "Exhibit 17." Letter from P. B. Locker to Mr. Janney, dated June 13th, 1911, with telegram in French attached, marked "No. 18." Letter from Mr. Locker to Mr. Janney dated July 7th, 1911, marked "No. 19." Letter from Mr. Locker to Mr. Janney, dated July 11th, 1911, marked "No. 20." Copy of purported receipts dated July 6th, 1911, marked "No. 21." Letter from P. B. Locker to Tenabo Mining & Smelting Company, dated July 11th, 1911, together with three sheets attached thereto, marked "Expenses incurred by P. B. Locker," marked "No. 22." Letter from Mr. Locker to the Tenabo Mining & Smelting Company, dated July 13th, 1911, marked "No. 23." Letter from Mr. Locker to the Tenabo Mining & Smelting Company, dated July 13th, 1911, marked "No. 24." Letter from Mr. Locker to Mr. Janney, dated July 18th, 1911, marked "No. 25." Letter dated July 25th, 1911, from Mr. Locker to Mr. Janney, marked "No. 26." Letter from Mr. Locker to Mr. Janney, dated August 8th, 1911, marked "No. 27." Letter from Mr. Locker to Mr. Janney, dated

(Testimony of John Janney.)

August 22, 1911, marked "No. 28." Letter from Mr. Locker to Mr. Janney, dated October 23, 1911, marked "No. 29." Letter from Mr. Locker to Mr. Janney, dated October 23, 1911, marked "No. 30."

WITNESS.—The letter which purports to be a copy of a letter written to Mr. P. B. Locker under date of November 19th, 1910, is a copy of a letter written by me on that date. (Letter marked "Exhibit 31.") The original of this letter was sent to Mr. Locker. He is in Paris. (Letter written by Mr. Locker to Mr. Janney, dated April 12th, 1912, marked "No. 32.") That is Locker's signature, and W. Mont Ferry is President of this company. Letter written by Mr. P. B. Locker to W. Mont Ferry, of April 11, 1912, marked "No. 33." [78]

WITNESS.—I was not present when Mr. Ferry received such a letter as that. Neither was I present when it was written by Mr. Locker.

Cross-examination (Resumed).

(What purports to be agreement between the company and Mr. Locker, marked Defendant's Exhibit "A.")

WITNESS.—The Board of Directors passed a resolution authorizing the execution of a contract between itself and Mr. Locker. At page 8, the minutes of the Board of Directors, under date of January 7th, 1909, reads:

"Whereas, negotiations have been pending with brokers of New York City and Boston, wherein it appears that a sale of 600,000 shares of the treasury

(Testimony of John Janney.)

stock of this corporation can be made, and whereas, it is the opinion of this Board of Directors that it is to the best interests of this corporation to grant an option for the sale of 600,000 shares of the treasury stock of this corporation to P. B. Locker of Salt Lake City, Utah, with full power to assign to others that he may desire: Now, therefore, be it resolved, that this corporation do grant an option to the said P. B. Locker, or assigns, to purchase 600,000 shares of the treasury stock of this corporation, at the price of 15 cents per share for the first 400,000 shares, and 20 cents per share for the remaining 200,000 shares, making a total of $100,000 for 600,000 shares of the treasury stock, payable as follows: "The sum of twenty thousand ($20,000) dollars to be paid to this corporation on or before the Tenth day of April, 1909, and the further sum of five thousand ($5,000) dollars on the first days of the months of May and June of said year, and the sum of ten thousand dollars ($10,000) per month on the first days of July, August and September, and twenty thousand ($20,000) dollars per month on the first days of October and November, 1909, making the full sum of one hundred thousand ($100,000) dollars.

"Said contract to provide that time is the essence of the same, and in the event said Locker or his assigns fail to make any of said payments, as therein provided, then said option will immediately cease and terminate, and the said Locker or his assigns to lose all rights to purchase said stock under the

provisions of said option; Provided, however, that the said Locker, nor his assigns, nor either of them shall incur any indebtedness or [79] liability of any kind against this company or its property.

"Provided, however, the Board may extend time of payments if it so desire, and the President and Secretary of this corporation are authorized and directed to execute immediately on behalf of this corporation such contract as will carry this resolution into full force and effect. Said contract to provide that the said Locker, or his assigns, is to cause a market to be made upon the 'Curb' of New York and elsewhere, as may seem best, giving market quotations of the stock of this corporation, and said contract to provide further that the stock books of this corporation shall be signed by the President and the Secretary and forwarded to the Carnegie Trust Company of New York City, with instructions to deliver treasury stock to the order of said Locker, or his assigns, in such amounts as may be called for, upon the payment to the said Carnegie Trust Company of the sum of 15 cents per share for the first 400,000 shares and 20 cents per share for the last 200,000 shares of the 600,000 shares covered by this option, the same to be placed to the credit of this corporation for its use and benefit.

Said resolution was seconded by Mr. Badger and being put to a vote was unanimously adopted."

WITNESS.—An agreement was made in writing by which I became the assignee of an interest in this contract. Defendant's Exhibit "B" is a signed copy

(Testimony of John Janney.)

of that agreement between myself, Mr. Tyree and Mr. Locker, two thousand two hundred shares of stock were issued pursuant to the terms of the contract marked Defendant's Exhibit "A": To Charles C. Wilson, 500 shares; John R. Nettlestrom, 200 shares; Ralph R. Phelps, 500 shares; same 50 shares; 50 shares to H. R. Page; C. R. Wilson, 500 shares; Ernk Le Pelly, 100 shares; L. H. Ranking, 300 shares. Remittance was made to the defendant corporation for these stock certificates. There was a remittance of $1,425.00 and another of $262.50. That is all the stock that is issued under the first contract. There has been other stock sold which is represented here on the minutes. The difference between that list, if I had it here, and that list, would be between what is sold and still undelivered. Some sales or contracts have been made with reference to stock, certificates of which have never been issued by the corporation. (Witness reads list.) That leaves approved by the Board and [80] not issued, the following: Perry, 100 shares; Pettit, 100 shares; Crandall, 10 shares; Newcomb, 100 shares; Olsen, 500 shares; Auerbach, 100 shares. These last named are charges upon the company in the form of treasury stock which is unissued but authorized. The first remittances that we made from Chicago were at the rate of 75 cents a share. There was some conversation between me and Mr. Locker. I returned to Chicago about the 15th day of March and I had been down to New York to adjust a matter with the Trust Company there, and when I returned to Chicago, I

(Testimony of John Janney.)
met Mr. Locker in the hotel and asked him how he was coming along with his work and he told me that he had gotten a very good start and had very good prospects, and then he said to me: "John, we cannot sell this stock at 75 cents and turn 15 cents into the company; we cannot do that." There started a conversation which resulted when we made our first formal statement to the company of our work and remittances, led us to writing a letter to the company in which we explained the situation we were in. Then a question was as between us and the company, and we decided that we had a perfect right to buy this stock at 15 cents per share. As far as the company and ourselves were concerned, the transaction was all right, but when we sold that stock to other people, a contractual relation arose between us and them and we found it was absolutely impossible to sell the stock unless we answered the question about its being treasury stock. The purchaser of the stock would say: "Is this treasury stock," and we would say "Yes," and immediately there was a contract between us and the man that the money would go into the treasury of the company subject, maybe, to a reasonable commission, and we did not want to split halves on that, so we decided to go back to our original plan of selling stock, and not to leave ourselves entirely free from protection in it—we wanted our expenses paid. At the time Mr. Locker made his contract with the company, we did not know of any market in which we could sell the stock at 75 cents a share. We had a general idea of a lot of different

(Testimony of John Janney.)

lines that we could carry out, but didn't have any definite idea where to do it. It was very difficult to sell in 1907, 1908 and 1909. When the panic of 1907 came on, it seemed to absolutely put a damper on that kind of business, and at the time the Locker contract was made, identified as Exhibit "A," we had absolutely nothing definite to go on, [81] and we had to create a market for the stock. The letter which was directed to the corporation, we wrote to Judge Varian, attorney for the company. This letter was dictated by myself and written by a typewriter in our room in the hotel in Chicago and signed by Mr. Locker. I do not know whether Judge Varian ever received the letter. Defendant's Exhibit "C" is another letter of the same date addressed to Hon. C. S. Varian, Utah Savings & Trust Building, Salt Lake City, Utah, and bears upon this matter. (This letter, directed to Mr. Varian, identified as Exhibit "C," was read.) It was dated April 16th, 1909.

There was a letter written to Mr. Varian bearing the same date as the one identified as Exhibit "C." That letter was dictated at the same place and under the same conditions as the other. Mr. Locker may have been there when it was dictated. He afterwards saw it and signed it and I saw him sign it and it was sent to Mr. Varian. I know Mr. Varian received it. When I went to his office to get the other letter, he produced a copy of this letter. He would not let me have the original, but made me a copy. (This copy is marked Defendant's Exhibit "D" and

(Testimony of John Janney.)
is admitted in evidence.)

Complainant's Exhibit 3 is a statement of expenses compiled by Mr. Locker on account of the Tenabo Mining & Smelting Company. The letter designated as "Exhibit 3" refers to another statement. This letter of July 12th shows that Mr. Janney "immediately left for Salt Lake City, and will in person make a full explanation of conditions as they now exist. We had a fuller statement than this and presented it to the board. There had been a good deal of trouble ever since we wrote that letter from Chicago and there seemed to be a misunderstanding somewhere that we could not get at, so I appeared before the board and explained to them how it was that in selling this stock we met with these conditions, and what the conditions were. These conditions were that we could not sell stock. I told them I was very anxious and very willing to go out and make a commission on a thing if I could do it legitimately, that the thing was in such a state and he had gone to so much expense that I was willing to do it, if the thing could be done in a satisfactory way and I had started out with that idea. I started with that contract with Mr. Tyree and Mr. Locker with the idea of making a commission. Now, when we [82] got to the time of selling the stock, we simply saw we could not sell the stock under the conditions—it was so hard to sell that we had to make every inducement to the purchaser to buy, and therefore I explained to them we could not work without a commission. The board took action on the matter covered by my

(Testimony of John Janney.)

statement, and the statement made by Mr. Locker, referred to in Exhibit 3. It passed a resolution on the 19th of July, 1909, appearing at page 14, as follows:

"Minutes of Tenabo Mining & Smelting Company meeting held pursuant to due notice, July 19th, 1909. Present: H. P. Clark, C. S. Varian, H. C. Edwards, and R. T. Badger The board listened to a report of Mr Janney regarding the plans of himself and Mr. Locker, with regard to disposal of treasury stock. Upon motion, it was unanimously resolved that P. B. Locker and J. W. Janney be and they are hereby appointed the agents of this company with authority to sell for cash at not less than fifty cents per share, the remainder of the treasury stock of this company yet unsold of the block of 600,000 shares which was by contract of the 14th of January, 1909, with the said P. B. Locker, authorized to be sold, being about 410,000 shares; subject to and in pursuance of the conditions of the contracts of this company with the Union and Windsor Trust Companies of New York, the stock so sold pursuant to this resolution to be registered and held for delivery in accordance with said instructions, and all of the money for which said stock is sold to be paid into the Windsor Trust Company subject to the order of the Tenabo Mining & Smelting Company. The authority to sell hereby conferred upon said Locker & Janney is limited to a period of sixty days from the 19th day of July, A. D. 1909, after the expiration of which time, said authority is to be considered revoked without fur-

(Testimony of John Janney.)
ther action of this board; and further it is expressly provided that no commissions or other compensation for their services are to be received by, or paid to, said Locker & Janney, or either of them, in any of the premises; but, that this board may in its discretion allow and pay such reasonable sums for expenses actually incurred by said parties in selling the said stock, as the board may determine to be equitable and just. Upon motion, meeting adjourned. Signed R. T. Badger."

WITNESS.—The instrument marked "Complainant's Exhibit 2," signed by H. [83] Tyree and myself, never became the basis of the turning over of the Gem Consolidated properties and the properties of the Tenabo Consolidated. That contract was deviated from entirely; completely abandoned. No performance whatever, from either side was made under it, and when the consolidation of the properties of the two companies was effected, it was without any regard whatsoever to that instrument, or any oral understanding like it. The Gem Company received 450,000 shares, while the agreement mentioned provides that the Gem Company should receive 400,000 shares, and the Tenabo Consolidated Company received the same. 300,000 shares is the sum provided in the contract. You see, this contract provides that the Little Gem Company shall receive 400,000 shares and that the Tenabo Company shall receive 300,000 and that there shall go into the treasury of the company, 500,000 shares. Now, when the deed was consummated, there went into the treasury

(Testimony of John Janney.)

750,000 shares and the Tenabo Company got 300,000 shares and the Gem Company 450,000, which rubbed out the amount provided here in this contract for 100,000 shares, and also 200,000 shares to be as a profit to Mr. Locker, Mr. Tyree and Mr. Janney in the promotion of the consolidation. There was no commission when the consolidation was effected. There was nothing that went to Mr. Locker and nothing that went to myself. Everything went into the treasury of our company that we got out of this consolidation deal, and I will say that was our intention of what to do with the commission appropriated to us in this contract here.

The letter purported to have been received by Mr. Badger, the Secretary of the company, was delivered to me by Mr. Badger along with these other papers of the corporation. The signature to it is Mr. Locker's. (Letter admitted and marked Exhibit "E" and read.)

I was not a member of the Board of Directors at the time the second arrangement was made for the sale of treasury stock by Mr. Locker. No sales have been made pursuant to that resolution. The statement presented by Mr. Locker aggregating about $3,000, to which reference has been made above, is a statement of the expenditures of money by Mr. Locker on account of the reports and examinations of certain engineers, the incorporating of the company, certain fees. (This statement admitted and marked Defendant's Exhibit "F.") Some of the items mentioned in Exhibit "F" were contracted during the

(Testimony of John Janney.)

life [84] of the first contract between the company and Mr. Locker. For instance, incorporating fees and those things. Also, the McVichie report, $330.55—that is the expenses of the examination. The Hobbs examination, $158.00. Here is an item of labor, A. E. Raleigh, $600. I don't know when that was, whether before the contract or afterwards. Trust company's fees (shown in the exhibit) were after the incorporation of the company and after the execution of the contract. Here is a statement of $1,199.00 expenses during a period of time which was prior to the execution of the contract, except for about one month—except for about $100.00. I don't know whether or not Mr. Locker paid out the moneys set forth in this statement in behalf of the corporation. He did this business so loosely that I don't know whether you would say paid it on behalf of the corporation or not. He did anything to make the thing a success and make it go along. If it needed anything he did it, paying—work upon the claims and things like that, it was very loose business. I would not say he paid them out on account of the company; I don't know. He didn't send a statement of these to be reimbursed. He sent a statement of these expenses for the purpose of showing to what extent he was going to accept the commissions under that contract. The only items in here that were really claims against the company was an item of a state fee for incorporating the company; the McVichie examination, the Hobbs examination, the Tenabo taxes, and printing and office expenses.

(Testimony of John Janney.)

They were matters that he did not present a bill to the company for. It was just simply to show outlays which he wanted to get back. This was not a bill presented to the company. It was accompanied by a letter to Mr. Badger at the time that he took out a part of the commission under the contract—a statement of expenses which he sent along with it. It was not sent to Mr. Badger with the other papers attached to each other, constituting Plaintiff's Exhibit 3. I sent it, but I cannot say exactly as to the time. It was pinned to the letter when the thing began and it has gotten so mixed up I could not say. I don't think it was that letter, though, because there is another expense account pinned to it. Subsequent to the date of the second arrangement referred to in the last minutes, there is a payment of $50 to Mr. Locker. It was on account. He received three payments at the time of the first remittances he made from Chicago, and that was the time he sent that expense account, to [85] show that those payments were covered by expenses. But he received only $50 after the second arrangement, which was on July 19th, 1909. There were two payments made to Mr. Locker in April and May, 1909—$1,140 and $210. The $1,140 item just referred to is the amount to which he was entitled under his first contract for the sale of 2,200 shares of stock. Referring to the method of the corporation in keeping its accounts and how they have been kept, what papers or instruments or entries have been made, with a view to keeping track of the company's business and affairs, I could say

the money received by the company was deposited in the bank. There were no entry books except the vouchers. The vouchers show an item of receipt by the company as well as an item of output by the company. If the company received April 20th, $1,125.00, there should be a voucher which shows where the money came from. Whoever is keeping the records and books of the company would make that voucher. To tell whether that has been done, I would have to look up the vouchers. This was at the time Mr. Badger was Secretary of the company.

Monday, Sept. 9, 1912, 10 A. M.

Redirect Examination—JOHN W. JANNEY.

Some of these letters (Exhibits 16 to 33), not those of a personal nature have been submitted to the Board of Directors of the defendant corporation. I couldn't pick out those which have. These letters marked for identification are not kept by me in the files of the Tenabo Mining & Smelting Company and I produce them in court because I asked Mr. Shank if he wanted my personal letters and he said he wanted them all. My personal letters are here. I took those letters out of the part of my personal file that has "T." Now, in my personal file I keep the letter of Mr. Locker with Pioche in "P" and Tenabo in "T." They came from a file marked "Locker." They were all received by me when I was Secretary. The company was interested in this business—they were personal letters. I couldn't answer the question and say whether they were received by me as Secretary. They were all addressed to me, 105

(Testimony of John Janney.)

Mercantile Block, Salt Lake City, Utah, and all of the letters addressed to the Tenabo Mining & Smelting Company were in the company's files. None of them were addressed to the Tenabo Company, except one of them in there addressed to W. Mont Ferry, President, which was taken out of the company's files at the request of Mr. Shank. He got a copy from my personal file and [86] asked if I had the original of that. That is the only letter in there addressed to the company and that letter came out of the company's files at Mr. Shank's request. These letters have never been in the company's file.

"It has been the habit of Mr. Locker when communicating with the company on company matters to address me personally and have me take up the matter with the Board of Directors. Mr. Pickard was Mr. Locker's attorney. Letter from Pickard with sheets attached, addressed to John Janney, under heading Tenabo Mining & Smelting Company, was put in the office files and regarded as a company letter. Offered in evidence marked Exhibit 34."

Mr. Pickard is Mr. Locker's attorney and attorney for the Underwriting Syndicate. The letter handed to me I received from Mr. Pickard and there was attached to it the sheets that are attached to the letter. It was received by me and addressed to me and at the heading of it "Tenabo Mining & Smelting Company" and put in the company's files. The contract admitted and marked "Complainant's Exhibit 35" is one of the contracts that was made by Mr. Locker. "That is the one that is referred in Mr. Pickard's letter."

(Testimony of John Janney.)

And the writing which purports to be an agreement entered into August 30, 1910, between the Windsor Trust Company, first part, Tenabo Mining & Smelting Company, second part, and Le Banque Franco Americane, third party, and the several stockholders of all Stock Trust Certificates, fourth parties, is a contract that was entered into by Mr. Locker pursuant to the power of attorney. (Contract admitted and marked "Complainant's Exhibit 36.")

I have a copy of the contract that is supposed to be a supplement to the Desouches Contract. (This is attached to Exhibit 35 as a part of that exhibit.) I have a copy of the contract executed between the company and J. H. Coleman, which is not signed. It was executed, I feel safe in saying, and has not been abrogated, as I understand it. The securities of this company have been passed upon by the French authorities who have jurisdiction over those matters. They have been admitted to France, and that contract with Mr. Coleman is, as I understand these matters, in a way, in abeyance, namely this: The contract between this company and the banker provides for an underwriting contract. That is to say, the banker agreed "to take firm," as they express it in France, a certain number of shares, [87] and we issued security from the bank as to that firm taking. That security was furnished in the form of an Underwriting Syndicate. Now, the Underwriting Syndicate contract contemplates that these securities shall be issued in France to the public, and the underwriters who have put up certain sums of

(Testimony of John Janney.)

money in the form of advances to fulfill this guarantee will receive a certain profit in the way of commission or increase. As I understand, the fulfillment contemplates the floating of the securities, which has never been done, and these underwriters have not put out this stock to the public, but they have divided this company money under this contract. I have no writing abrogating this contract. I suppose I could say that the company is acting under this contract. (Contract admitted and marked "Complainant's Exhibit 37.")

"We have been acting under that contract. It has not been abrogated. The securities of this company have been passed upon by the French authorities. The security was furnished in a form of an underwriting syndicate. The contract with that syndicate contemplates these securities shall be issued in France to the public, and the underwriters who have put up certain sums of money in the form of advances to fulfill will receive a certain profit in the way of a commission. They have divided this company's money under that contract. The company is acting under that contract now."

I have a contract executed by my company with George Kroll. I am told that contract is not being operated under by the company.

Cross-examination.

There is no money paid out by this corporation except through checks or debit slips, which are kept by the bank. When a check is sent to anyone, a voucher is kept, which represents a receipt. The

(Testimony of John Janney.)
cancelled checks and the stubs of the check-book constitute the original record of the corporation, and the corporation is now in possession of all those returned checks and accompanying vouchers. The bundle which Mr. Ashton hands to me, which purports to be checks, are the checks drawn upon the deposit of the company in the Utah National Bank, and they represent all payments made by the corporation between the dates shown on the first and last checks. The first check [88] is April 21, 1909, and the last, December 6, 1911. Entered by us in this book (referring to book) is an account which shows the amount of each check, the person to whom paid and the date when paid. This book is the book which accompanies the check. It has entered the name of the payee; it has a memorandum column to state what paid for, and it has a column for the amount and a column for the date, and that book contains a statement of each company or individual to whom a payment has been made during the life of the corporation. Besides the checks exhibited above, there are checks of the Merchants' Bank and Walker Bros. Bank. This other series of checks you hand me are the checks of the Merchants' Bank, and the book which has been exhibited shows the names and the persons and the dates when each of these checks was drawn on the company funds. There are one or two of these that have no voucher, but the checks show, and I have vouchers here that cover, $1,180.00. The checks cover $1,452.18. The book offered in evidence reads as follows:

(Testimony of John Janney.)

Date.	In Favor of.	In Payment of.	Check No.	Amount Check.
1909.				
4/21.	P. B. Locker.	Com.	01	$1140.00
5/12.	P. B. Locker.	"	02	210.00
5/14.	Robt. Hogan, Treas. Lander Co. Nev.	Taxes 1908	03	70.23
"	" " "	" 1908	04	81.09
6/14.	" " "	" "	05	1.00
7/3.	C. S. Varian.	Expense, Telegrams, etc.	06	15.55
9/16.	V. M. Ramie, Jr.	Bill Litho.	07	3.75
10/22.	McC. & Co. Bank of Austin, Ne.	Rec. Deeds	08	6.65
11/29.	C. S. Price.	Fees & Expenses patenting Widows Mine	09	160.30
	McCornick & Co.	Note Reliance Mng. Co. 10/5/7 15,000 and int. 3860.00	10	18860.00
	H. C. Edwards.	Atty. Fees and salary	11	1025.45
	C. S. Varian.	Atty. fees and salary	12	700.00
	R. T. Badger.	11 months' salary	13	550.00
	Lester D. Freed.	Do.	15	550.00
	H. P. Clark.	Do.	14	550.00
	Robt. Hogan Treasurer Lander Co., Nev.	Taxes 1909	16	81.15
11/29.	Utah Litho. Co.	Expense	17	107.50
12/2.	George Weston.	Advance a/c. ass's work on Co.'s property.	18	200.00
12/6.	Utah Litho. Co.	1500 Stock ctfs.	19	80.00
12/13.	George Weston.	Assessment work on property	20	319.00
[89]				
12/21.	H. P. Clark, Pres.	Do to Geo. Weston.	21	481.00
12/29.	C. S. Varian.	Atty. Sal. Dec. 09.	22	50.00
	R. T. Badger, Treas.	Do.	23	50.00
1910.				
Jan. 6.	Geo. Weston.	Bal. Asst. Work.	24	1.55
	McCornick & Co.	Attys. lien on escrow papers from E. B. Carstall	25	75.00
				$25369.22

Date of Deposit. 1909.	Amount of Deposit.	Balance.
April 20th.	1425.	285.
May 11.	262.50	
Nov. 20.	24551.40	
	26238.90	869.68

Date. 1910.	In Favor of.	In Payment of.	Check No.		Amount Check.
1/12.	R. L. Polk & Co.	(Expense) Bill rend (Not issued)	26		-0-
1/25.	Bank of Austin, Nev.	Ex. recording Deeds	27		1.00
1/25.	Bert Acree, Recorder.	Do.	28		38.45
31.	R. T. Badger, Treas.	Salary, Jan. 1910.	29		50.00
	C. S. Varian.	Do.	30		50.00
2/4.	N. Y. Dft. Windsor Trust Co.	a/c. telegrams	31		2.45
9.	Yourselves Mt. N/B.	Wires, telegrams per list.	32		10.54
9.	Mt. N. Bank.	Exp. Chgs. to N. Y. Stock Banks 1/9/10.	33		2.00
	Do.	12/31/09.	34		1.75
11.	Bert Acree, Recorder.	Rec. Deed			
	Lander Co., Nevada.	Rec. Deed 4.75	35	Void	-0-
11.	Bank of Austin, Nev.		36		2.75
11.	Telegram	Tel. to——— deducted from a/c. by Bk.	No. ck.		.75
15.	W. D. Armstrong.	Assessment work Rel. Co.	37		144.00
15.	A. E. Raleigh.	Do.	38		256.00
3/4.	J. W. Edmunds.	Auditing accts.	39		25.00
3/8.	Kelly Company.	2 Stock Ledgers	40		6.00
8.	Breeden Off. Supply Co.	1 minute book	41		3.50
8.	Utah Litho Co.	2000 ctfs.	42		110.00
23.	P. B. Locker.	Pmt. on a/c.	43		550.00
28.	E. O. Howard.	Salary	44		50.00
28.	W. Mont Ferry.	"	45		50.00
28.	Jno. Pingree.	"	46		50.00
28.	Benner X. Smith.	"	47		50.00
28.	Jno. Janney.	"	48		50.00
28.	Bank of Austin.		Void		-
28.	Jno. Janney.	Tel. & Exp.			15.20

Date.	In Favor of.	In Payment of.	Check No.	Amount Check.
3/29.	Benner X. Smith.	Atty's. fee	51	150.00
3/19.	John C. Tyree.	Labor	52	50.00
19.	Century Prtg. Co.	Letter heads	53	5.00
6/1.	Union Assay Office.	Assaying	54	8.10
1.	H. P. Clark.	"	55	3.00
11.	Postal Tele.	Cables & Tels.	56	14.06
17.	Windsor Trust Co.	For list of Stockholders	57	10.00
10/5.	Century Ptg. Co.	Reports & Env.	58	20.50
11/11.	Robt. Hogan, Tax Receiver.	Taxes, 1910	59	28.50
11.	Postal Tele. Co.	Telegrams	60	4.45
12/29.	"	"	61	75
29.	Century Ptg. Co.	Reports & Env.	62	12.00
1911.				
Mar. 9.	" " "	" " "	63	14.00
9.	W. U. Tel. Co.	Telegrams	64	2.60
9.	Postal " "	"	65	10.34
9.	Kelly & Co.	2 Let. files	66	1.00
4/19.	Postal Tele. Co.	Telegrams	67	4.07
19.	W. U. " "	"	68	1.85
May 9.	Grocer Ptg. Co.	Let. hds. & Env.	69	7.25
June 11.	Sec. of State of Nevada.	Copy of Order of Court	70	2.40
Dec. 6.	H. C. Edwards.	Court fees for Clerk	71	10.00

Date of Deposit.	Amount of Deposit.	Balance.
1910.		
Mar. 16.	$ 869.68	
	1000.00	
	1869.68	
		1007
		282
		42

In Account with Merchants' Bank.

1910.			
Dec. 17.	Cashier's Check to A. E. Raleigh.	Assessment work	400.00
17.	A. E. Raleigh.	" "	300.00
1911.			
1/6.	" " "	" "	200.00
1/6.	Cashier's Check to J. W. Wade.	P. B. Locker a/c	50.00
18.	A. E. Raleigh.	Assessment work	200.00

Date.	In Favor of.	In Payment of.	Check No.	Amount Check.
24.	Merchants' Bank. (W. H. Sherman).	Expense a/c Abstracts		4.90
2/8.	Jno. Janney, Secretary.	4 mos. salary (a/c off. exp.)		200.00
8.	Tel. to Arthur Jones.			1.25
8.	W. H. Shearman.	Legal fee		20.00
4/7.	A. E. Raleigh.	Location 28.00 Rec. 2.00	1	30.00
7/3.	Wells, Fargo Express Co.	Express on stock books	3	6.30
5.	Postal Tel.	Telegrams & cables	4	10.03
5.	Stephens, Smith & Porter.		5	30.85

[91]

Date of Deposit.	Amt. of Deposit.	Balance.
1910.		
Dec. 17.	1500.00	
1911.		
Feb. 8.	1.25	47.92

Date.	In Favor of.	In Payment of.	Check No.	Amount Check.
11/18.	W. H. Shearman.	On prom. note	01	712.50
24.	Postal Tel. Co.	Telegrams	02	26.32
28.	Walker Bros. Bank.	Check book	03	1.50
29.	W. U. Tel. Co.	Telegrams	04	25.83
Dec. 1.	Windsor Trust Co.	Transfer fee, etc.	05	406.90
6.	Skeen & Skeen.	Tyree labor (1909)	06	250.00
7.	" "	Int. Tyree Labor a/c 1909	07	25.00
11.	A. E. Raleigh.	Labor	08	100.00
18.	N. B. Robertson.	Clerical serv.	09	100.00
20.	A. E. Raleigh.	Labor	10	500.00
21.	Century Ptg. Co.	Printing	11	3.25
22.	Utah Nat. Bank.	Overdraft	12	7.18
1912.				
Jan. 2.	Union Trust Co.	Registering stock	13	375.00
15.	A. E. Raleigh.	Labor	14	200.00
Feb. 29.	" " "	"	15	150.00
Mar. 5.	Postal Tel. Co.	Telegrams	16	5.92
Apr. 1.	W. U. Tel. Co.	"	17	28.75
11.	" " " "	"	18	7.23
17.	A. E. Raleigh.	Labor	19	171.40
May 9.	Stephens, Smith & Porter.	Attys. fees.	20	500.00

(Testimony of John Janney.)

Date.	In Favor of.	In Payment of.	Check No.	Amount Che
11.	Edith Shearman.	On prom. note	21	250.
17.	A. E. Raleigh.	Labor	22	387.
27.	" "	"	23	412.
June 7.	Western Union.	Telegrams	24	15.
26.	W. Mont Ferry.	Directors fee	25	150.
28.	John Pingree.	" "	26	150.
July 5.	E. O. Howard.	" "	27	150.
9.	Walker Bros. Bank.	Telegram	28	1
20.	John Janney.	Directors fee	29	150.
				5263.

Date of Deposit.	Amount of Deposit.	Balance.
1911. Nov. 17.		
1912.	2900.	
Mar. 27.	2887.18	
May 24.	34.82	
July 15.	724.65	1283.61

[92]

The checks purporting to have been drawn on the Walker Bros. Bank were drawn against the company's funds. I think we have all the vouchers, accompanying them, here. (Checks on the Utah National Bank are marked Defendant's Exhibit "G"; Merchants' Bank checks, Exhibit "H"; and Walker Bros. Bank checks, Defendant's Exhibit "I.")

WITNESS.—Now, I would like to say that all of these checks added up and deducted from the amount the corporation has received gives me the balance in the bank. I went over them last night. I have no book or memorandum which shows the source of income of the defendant. The company has received two remittances from Mr. P. B. Locker under his contract. They are accompanied by a letter from him. These are on file.

When I left Salt Lake last November, I went east

(Testimony of John Janney.)

expecting to visit my family and be gone only a short time. I was away eight months. There was a lull in the company's business. There was nothing particularly to call me to Salt Lake, and there were things which seemed to come up which made it worth while for me to be in the east. I had occasion to see the Windsor Trust Company. It is not drawing anything from this company now. The lawsuits had a great deal to do with the lull in the company's affairs. Then, there was an article that came out in a New York paper that I think I would have gone from here to New York to see about that, that did the company injustice, and should be looked after. Again, Mr. Locker wasn't paying the Trust Company for their services under their Trust Agreement, and they didn't exactly understand why, and I wanted to explain that to them; and now they seem to be waiting in perfect willingness for Mr. Locker. All these things related to the interests of the company in an indirect way and were engaging my attention in New York and in the east, and I considered them very important. By a "lull" I do not mean the company's interests were not being cared for nor its business affairs neglected.

The attorney's fees to Mr. H. C. Edwards, to which I refer in my testimony in main was in connection with the McCornick mortgage. That bill was for the foreclosure of the mortgage upon the Gem property. The instrument marked Defendant's Exhibit "J" is a note in the sum of $15,000, purporting to be signed by the officers of the Reliance Mining &

(Testimony of John Janney.)

Milling Company, which was a [93] lien upon the Gem property at the time this corporation took the Gem property over. (Exhibit "J" admitted in evidence.) The document marked Defendant's Exhibit "K" is one of the papers I found among the vouchers turned over by Mr. Badger.

"Respecting my direct testimony relative to a certain block of 66,000 shares of stock having been sold." I took the payment from the Franco-Americane Bank and estimated from the contract what that would offset. I have it figured out here as 63,000 shares, less 30,000 shares deposited in the Windsor Trust Company, leaving 33,000 shares net, is what I would estimate as what the company's contract with the Franco-Americane Bank entitles these underwriters to for these payments we have made. You see, Mr. Locker and myself have deposited in the Windsor Trust Company 30,000 shares to the company. The contract with the company provides that we shall idemnify them for over and above 50 cents a share, and that was the purpose of depositing 30,000 shares of our own stock. For the 30,000 shares of French stock, the total received was $6,511.83. The first item that enters into and constitutes the sum above mentioned was $2,900, received by Walker Bros. Bank on November 17, 1911; the next item is $2,887.18, received March 27, 1912; the next item is July 15, $724.65. That is all that the company has received from the Franco-Americane Bank. It received $34.82 as the amount of money sent back by Mr. A. E. Raleigh. That was a refund. The $7.18

shown by the cash-book of the Utah National Bank, I presume was a deposit to cover an overdraft. On April 20, 1909, the company received $1,425.00 from Mr. Locker; in May, 1911, $662.50 from Mr. Locker. I see a deposit here in the bank account, November 20, of $24,551.40. I presume that is the net amount of the $25,000 received from New York from the sale of 165,000 shares of stock. The resolution shows what this is for. This is the McCornick Bros. transaction to which I testified. On March 16, $1,000. That came from Mr. Locker and is the McCornick check sent in by Mr. Locker. It is entered here March 16, 1910. I feel safe in saying that this $1,000 was for transfer of stock purchased by Mr. McCornick. On December 17, 1910, there was an amount deposited [94] of $1,500. It represented a loan from Mr. Sherman—the Sherman mortgage, which I have heretofore mentioned. There is also an item of $1.25. The bank charged a telegram to the company here, when it should have been charged to me, personally. I stated that the company owes Mr. Locker at present $950, of which $50 has been paid; I find there has been another payment of $550 which further reduces it.

I cannot say how frequently informal meetings of the Board of Directors were held during the first year of the existence of the company, except that they were held frequently. I remember that several meetings, extending from 2 o'clock in the afternoon until 6 P. M., were held, and I have a recollection of several meetings that went up to 7 o'clock and there

(Testimony of John Janney.)

were a number of these meetings very frequently the first half of April. There was then a lull for a month or so. This was during the time I was an officer of the corporation.

The statement which has been introduced in evidence was a bill of Locker & Janney, which was the one in the resolution. I was in Twin Falls, Idaho, and it seemed that it was imminent that an engineer should come out from France and examine the mines, so I telegraphed to Mr. Raleigh to straighten up the mine and get it ready for the engineer's examination. That incurred some little expense. I do not remember just how much, and I submitted that to the Board of Directors as an item I thought they should pay, because it counted on the assessment work, and that was one of the items, I now remember, that entered into the account as specified in that resolution. There were a lot of other items that entered into it, at the time I thought were perfectly proper.

Mr. ASHTON.—Now, I desire to offer in evidence, if the Court please, all the minutes of the Board of Directors, including the loose sheets. They have not yet gone into the evidence.

Mr. SHANK.—No objection. (Received.)

(The minutes of the Board of Directors referred to in the last paragraph are contained in the minute-book, including pages 1–91, both inclusive, minutes of April 20, 1912, and the minutes of April 20, 1912, consisting of two pages, loose sheets, and the additional minutes which were not added in the regular manner to the book, dated August 30, 1912, consisting of one page.)

(Testimony of John Janney.)

WITNESS.—These that I have put in here are what has been signed by me [95] and they are minutes. The additional minutes which Mr. Ashton offers consist of seven sheets, bearing date of the 26th of June, 1912, November first, 1911, December 6th, 1911, and April 20th, 1912. There is nothing else that I know is a minute.

The company has kept, through its agent, the Trust Company, a record of the stock. That record shows the number of certificates and to whom it was issued. The only books that I have not mentioned are memoranda, showing the keeping of the business and the books that relate to the transactions in stock. The defendant corporation did not authorize the issuance of a prospectus, marked Exhibit No. 11, designated as the French prospectus. It has some correspondence to that effect. The cablegrams and telegrams and letters purporting to refer to that matter are the telegrams and copies of telegrams, letters and copies of letters, and a copy of the resolution sent and the letter received from the Franco-American Bank. (The papers last referred to were admitted in evidence and marked Defendant's Exhibit "L.")

Respecting the expenses which have been incurred with a view of financing the defendant company in France, we have in the files of the company a record which shows that there was deposited $15,000.00 in the Franco-American Bank, by Mr. Locker, on his own account for the expenses of this UNDERWRITING SYNDICATE. I have a letter respecting this $15,000. It is addressed to the Syndicate of the

(Testimony of John Janney.)

Tenabo Mining & Smelting Company, as follows: "We have the honor to inform you herewith of the current account with you to the 30th of September last at present to this date—francs 12,043—15 centimes, to your favor, which we report you this credit herewith." Signed by the Franco-American Bank, and on the other side, a statement of the expenses. Other expenses, Mr. Locker has made two trips to Paris, and he has sustained himself in Paris for two years, and the personal expenses incident to that he has made an outlay of. In getting the stock on the Paris market, there is a tax of $10,000.00 required by the government. That $15,000.00 paid that and $5,000.00 more. That is what the report from the attorney shows—$10,000.00 to the government. I know the Windsor Trust Company's bill for printing those certificates was approximately $3,000 and those expenses add up very much in [96] excess of this $15,000 and the contract states it to be $30,000 namely, 150,000 francs. Now, they report that it vastly exceeds that amount when they pay all the expenses, because they paid all the expenses of this office. That Underwriting Syndicate has been sustaining this office, which this company has nothing to do with, and has not paid them. It has not paid for it and never will. The defendant company has no office in Paris.

I have examined the stock books of the corporation. As to whether or not the blank stubs disclose to whom, the date and amount of certificates, to whom issued, and the date thereof, and the dates issued, we have

(Testimony of John Janney.)

a complete report, but we do not keep it on the stubs. This record shows every certificate that has been issued and the name and the amount, and it is so accurate that in checking over this book, I was able to ascertain the particular certificate and the particular book from which it was taken, that Mr. Shank took in Salt Lake when they were taking the depositions. It is from Book "Q" (book marked Defendant's Exhibit "M," admitted in evidence). "Exhibit 'M' is an exhibit kept by the trust company and not by the defendant."

I have been in the Windsor Trust Company office especially to see them about that, and that is one reason I went to New York. I made four trips to New York, and I remember now that was the reason for one of them. It is the most approved method, stated to be the most scientific way, and I approve it.

Redirect Examination.

Exhibit "M" is an exhibit, is kept exclusively by the Trust Company in New York. It is a copy of the original. I have a record in our office. I got that for the purpose of this trial, and also for the purpose of continuing to keep it in my office from there on, and keep it posted up to date as near as can be. On April 20, 1909, Mr. Locker paid into our company $1,425.00, and on April 21st, we paid him back $1,-140.00. On May 11th, 1909, he paid $262.50, and we paid him back $210.00. On March 16th, 1910, he paid in $1,000.00, and on March 23d, we paid him back $550.00. I do not know how much Mr. Locker received from the sale of these French contracts.

(Testimony of John Janney.)

[97] That money comes into the bank to the credit of the company. I have no way of knowing how much has been realized by Mr. Locker or by any of the agents of the Syndicate in France from the sale of these certificates. I have received nothing. I do not know what Mr. Locker has received. He has advanced me money that he says he borrowed from the bank. Mr. Locker took 25,000 shares of my personal stock and negotiated a loan. He sent me $900.00 from Paris three or four months ago. "The last remittance from you before that was along about the 15th of January, $1,000.00? The last money the company received from stock sales was July 15th, $724.00, and the next payment prior to that was March 27th, $2,887.00. These are two remittances received by us from the Franco-American Bank. "He sent me $1,900.00 during January of this Year." At the time I left for the East—November or December—he sent me $400.00.

When Mr. Locker sent me a remittance, he would tell me he had borrowed the last one. Mr. Coleman, of the Franco-American Bank, loaned him that $900.00, because Mr. Coleman was interested in the Syndicate. I do not know whether Mr. Locker received any compensation or commissions on the sale of the French certificates of stock resulting in the two last remittances to the defendant company. He has never advised me of the source of any commissions which he has received, or if he has received any. I do not know by what means Mr. Locker has sustained himself in Paris these two years, except what he tells me.

(Testimony of John Janney.)

These letters I have submitted are letters that came from the letter "T" of the Tenabo file in the Locker file. I regard them as personal matters, and I thought they related to the Tenabo company and that I should keep them separate. I took most of them to the board. I did not take all of the letters that I put under the letter "T." I did not want to annoy the board to that extent, but I thought the board was entitled to see them if they should ask for them, and I thought I would keep those letters in that way.

I do not know at the present time how many shares of stock have been issued on these recent sales in France. The amount of stock we have put up to the company is 31,100 and some shares and the amount required we put up is 30,000 shares. **[98]**

Monday, September 9, 1912.

AFTERNOON SESSION.

Mr. JOHN JANNEY, redirect examination continued.

I have been at the mining property of the defendant a number of times. I have been going down to Tenabo since 1907, but I do not remember how many trips, but I have not been there since the incorporation of the company in 1908. I did not know there was a resolution passed by the board of directors on October 29th, 1910, authorizing Mr. Locker to retain 150,000 francs. I think it was to the UNDERWRITING SYNDICATE, and so far as I know no portion of it has been paid.

Mr. Locker was authorized by the defendant company to issue a prospectus. I am referring to the one

(Testimony of John Janney.)

attached to the deposition of Mr. Ferry. The letters signed by Mr. J. E. Frick and others added to the exhibit attached to Mr. Ferry's deposition make the complete record or prospectus that we have authorized. (Letters offered and received, marked Plaintiff's Exhibit No. 38.) Miss M. B. Robinson made up for filing with the attorney general the report, Plaintiff's Exhibit No. 8. She was the clerk in our office. She made it under my direction. Also the same with relation to the statement filed with the attorney general under date of May 31, 1911, being Plaintiff's Exhibit No. 9.

[Testimony of E. T. Patrick, for Plaintiff.]

Mr. E. T. PATRICK, called as a witness on behalf of plaintiff, testified as follows:

My name is Edward T. Patrick. Am deputy attorney of Nevada. I here produce all the records showing the filings with the Attorney General of reports of the Tenabo Milling & Smelting Company under the laws of the State of Nevada. The date of the last of those is July 1st, 1911. There is one dated June 30, 1910, and another November 30, 1910. (They are offered and received in evidence, subject to the objection that they are irrelevant and immaterial and not within the issues made by the pleadings.)

[Testimony of Andrew Maute, for Plaintiff.]

Mr. ANDREW MAUTE, on behalf of the plaintiff, testified as follows:

I live in Carson City, Nevada, and am familiar with the French language. I have made a transla-

tion of Plaintiff's Exhibit No. 11. The typewritten sheet handed to me by Mr. Shank is a translation of the first sheets referred to in said Exhibit No. [99] 11. The other sheet is a translation of the second of the sheets. I went over this translation yesterday and found it was correct as nearly as possible. The third sheet also. When it comes to an exact and literal translation, that is not a possibility. (It is admitted that the translation was substantially correct, and that the three sheets may be attached to Exhibit 11 as a translation of it, subject to the objection that they are not within the issues, incompetent, irrelevant and immaterial, and not in any way connected with the defendant company.)

[Testimony of Frank L. Sizer, for Plaintiff.]

Mr. FRANK L. SIZER, called on behalf of the plaintiff, testified as follows:

I live in Palo Alto, California; am a mining engineer. I have been a mining engineer for thirty years. After graduation at the University of Michigan I obtained my first practical experience at Leadville, Colorado, where I was employed as a mine surveyor, draughtsman, assayer, and later assistant superintendent. I have been engaged in mine examinations, direction and mining operations, as manager or consulting engineer, and have had experience in all of the mining States of the United States, also in British Columbia, Alaska and Mexico. At present, I am consulting engineer for the Mascot Copper Company in Arizona, and I am doing examination work as it is offered to me. I have made an exam-

(Testimony of Frank L. Sizer.)

ination of the geological condition of the mines of the defendant company. I have examined and sampled all of the accessible openings of the Tenabo Milling & Smelting Company, and have examined adjoining properties.

The country in which these mines are located is a quartzite and quartz porphyry, with porphyry dykes and veins cutting through the formation in some places. "These veins bearing gold and silver and copper ore." The Tenabo property is located about 23 miles from the Southern Pacific Railroad. The means of access is by wagon road. From the Tenabo Company properties, I took five samples. I delivered them to an assayer. I should say that the development of the mining district of the Tenabo is not sufficient to justify the establishment of a smelter or stamp-mill.

Cross-examination.

I have been a witness many times with reference to geology or mining [100] properties, and in reference to the practical ends of mining. Mr. George S. Kimball first approached me on becoming a witness in this case, and I afterwards saw him and discussed the matter with him. He told me to examine the mines, to ascertain their value, and that I would be required as a witness. He said it was a suit for a receivership based upon the question, I think, of the management of the property. On the evening of the second day that I was in the Tenabo district, he submitted to me the report of Mr. Duncan McVichie. I was five days making the examination and confin-

(Testimony of Frank L. Sizer.)

ing my surface examination to about 300 acres. I thought I could get a substantial understanding of that 300 acres so far as the openings went. I recollect discovering five beddings. The veins were bedded in quartzite and quartz prophyry. From the surface it does not seem to be a fissure.

"I saw ore on the surface of the Gem claim lying between strata of the same kind of rock, which indicated to me that the vein there was not a fissure. It is possible for a fissure to exist with both walls existing in the same kind of rock. The peculiarity about this that indicated that it was not a fissure, was that it was in the strata. By strata, I mean the parting in the beddings. My examination of this property was very thorough with regard to everything except the Gem. The determination that where a fissure vein with mineral in it will develop into a mine, depends to a great extent upon the conditions disclosed by developments in the depths. I saw the evidence of mineral on the surface of the Gem. I did not see anything further that I thought worth while to sample."

Redirect Examination.

I did not examine the Gem, because the carbonic acid gas fills the workings and it is impossible to get in them. "And Mr. Raleigh, who was in charge of the property, refused me the use of the machinery on the property to blow fresh air into the mine. He gave no reason for his refusal, simply said he would not give permission until he was directed by someone in Salt Lake to do so. We then tried to get permis-

(Testimony of Frank L. Sizer.)

sion from Salt Lake, but failed." I examined the Gold Quartz property. It is in the same district. This examination increased my knowledge very much. I examined three different [101] properties in the Gold Quartz and took in my examination 41 samples.

Recross-examination.

In my examination, I found six veins on three different properties. I am not ready to say that I found what I believe to be Gem vein in the Gold Quartz property. It might be, but I am not sure. In order to become familiar with the geology of the mining camp, one is required to expend considerable time, investigating surface conditions as well as underground conditions, but I think that that geology was very easily read. I examined the vein only to a depth of forty feet and only in some shallow surface openings. I could not be sure whether it was a bedded vein from that examination, and that was the only examination I made that had reference to it.

[Testimony of Max R. McColloms, for Plaintiff.]

Mr. MAX R. McCOLLOMS, on behalf of plaintiff, testified as follows:

I reside at Reno, and am an assayer. Mr. Frank L. Sizer delivered to me certain bags of ore, numbered 3629 to 3624. I assayed those samples separately and as independent assays of the various samples that he delivered to me, for gold, silver and copper. I found the assay No. 3629 to be, in total values, $29.70; No. 3630, $25.20; No. 3631, $27.60;

No. 3632, $12.70; No. 3633, $16.60; and No. 3634, $16.95.

[Testimony of Frank L. Sizer, for Plaintiff (Recalled).]

Mr. FRANK L. SIZER, recalled by the plaintiff.

I have compared the valuations which I got with the valuations reported by Mr. McVichie and Mr. Brown. My assays and Mr. Brown's are almost identical, and Mr. McVichie's are about 30% higher.

The following testimony, to wit, that of Edward O. Howard, W. Mont Ferry, John Pingree, Benner X. Smith, C. S. Varian, Lester D. Freed, H. P. Clark, R. T. Badger and Duncan MacVichie, witnesses for the complainant, and Charles D. Bates, who was called as a witness for the defendant, was all taken before J. W. Christy, Standing Examiner of the United States District Court for the District of Utah, and Special Examiner for this court, and was, at the trial, by stipulation duly admitted:

Report of Testimony, Evidence and Proofs of John W. Christy. [102]

I, John W. Christy, Standing Examiner of U. S. District Court for Utah, report that, by reason of my commission to take testimony and proofs of both parties, by order of Jan. 20th, 1912, J. D. Skeen, and complainant, appeared in my office on the 6th day of February, 1912, and presented to me the annexed stipulation to adjourn taking of testimony at 10 o'clock A. M. of the 12th day of February, 1912, to which I assented.

On February 12, 1912, 10 A. M., complainant and

(Testimony of John W. Christy.)

J. D. Skeen, attorney, ask for second adjournment of the hearing of testimony until 19th day of February, 1912, to which I assented.

On February 19th, 1912, at 2 o'clock P. M., said complainant again appeared with his attorney, and on account of the absence of H. C. Edwards from the city, meeting adjourned until the 20th day of February, 1912, at 11 o'clock A. M.

On February 20th, 1912, at 11 A. M., said complainant, by counsel, and said defendant, by counsel, comes, and having announced readiness, I personally took testimony following:

[Testimony of Edward O. Howard, for Plaintiff.]

EDWARD O. HOWARD.

My name is Edward O. Howard. I am cashier of Walker Brothers Bank, and have been such for two years. I have resided in Salt Lake City twenty-two years. I am treasurer of the Tenabo Mining & Smelting Company, and have been for two years.

The other officers of the company are W. Mont Ferry, President; John Pingree, Vice-President; John Janney, Secretary, I believe, and I am Treasurer. The active officers just named, together with Benner X. Smith, constitute the board of directors. I do not think there is an officer that we consider a managing officer, unless it is Mr. Janney, who has been more active than any other person. The company maintains offices at the Mercantile Building in this city. Mr. Janney is in charge of same. At the present time, Mr. Janney is in New York, I believe. He went about the first or middle of January. I

(Testimony of Edward O. Howard.)
have not been in the offices since Mr. Janney left. He keeps the books, assisted by his clerk. The clerk, or stenographer, is not there now. The books consisted of the minute-book and other books of record which are kept by all companies, I suppose. I never see them. [103] Well, I have seen the minute-book, book of record, and the stock books.

The board of directors meets at irregular intervals, or when occasion offers or business demands. (Defendant objects to evidence as not best.) The secretary or president called the meetings. (Objection to same.) We had no regular meetings of the board, although we met frequently. (Objection by defendant, as irrelevant.) We have had, I should say, fifteen or twenty meetings. I kept no particular track of them. When a meeting was desired, the president or secretary would call up the members of the board and give notice thereof. The secretary keeps the minutes of the meetings. The minutes were always read at the subsequent meeting and approved in ordinary method. The minute-book is in the hands of the secretary, I suppose. I suppose when he left for New York he left them in his office here.

Mr. Janney told me he was going east. I did not know he was going to New York. He told me definitely only a day or so before he left. I do not know what business he went upon. The board of directors did not discuss what he was to do in New York. I do not remember whether I asked him how long he would be gone. (The evidence objected to as irrelevant.)

(Testimony of Edward O. Howard.)

He did not tell me what he was going to do about the office while gone. (Ojection made, evidence being irrelevant.) I do not know where any of the books are except the check-book, which he gave me. I got that about the 17th of November and I drew the next check. That was about 1911, I think. Mr. Janney was here at that time. I did not draw checks prior to that day but signed them all—well, not all. The stub was filled out by me on that day, and that is why I remember the date. (Witness produces book on request.) The company had another check-book opened on November 17th, 1911. The account prior to that was kept with the Utah National Bank, and when the account was transferred to Walker Brothers Bank, that check-book was prepared. I have, I think, drawn up or signed all checks drawn upon the company's funds since my election as treasurer in February, 1910. We transferred the account to our bank simply out of courtesy to the treasurer, I guess, I did not request it. If there was any other reason, I do not know **[104]** it. As a matter of fact, the account was not really transferred. There was some money coming into the company's funds, and that was deposited with the Walker Bank and the account with the Utah National was closed about that time.

The cancelled checks evidenced by the stubs shown here are at the Walker Brothers Bank. I did not bring them with me. I thought you wanted only the records of the company. However, I can get same. The system used by our company is this—the secretary fills out checks and presents them to the treas-

(Testimony of Edward O. Howard.)
urer for signature, together with a voucher for receipting on payment of check, showing nature of the disbursement, the treasurer then signs the check. The one receiving the money signs vouchers. It is not formally approved. The treasurer pays whomsoever the secretary tells him to pay. The signature of the president is not required. The board of directors does not audit same either.

As a general thing, the treasurer does not get those vouchers. On or about November 17th, the company received a sum of money and deposited it in the Walker Brothers Bank. It was between $2,900.00 and $3,000.00. It was a telegraphic transfer paid to the company through the Utah National Bank, under instructions from their New York correspondent, and was received, I think, from Mr. Locker. It was for the use of the company—disbursements. I do not know anything else about it. The other officers might know. We have not had any board meetings since that time. I think I asked Mr. Janney at the time where it came from, whether it was a loan, etc. I don't know that I was surprised at receiving it. (Objection to this, as being immaterial.) There was no entry made of it upon my book. I did not keep any treasurer's books. It was put to the credit of the Tenabo Mining & Smelting Company. Received the same as cash deposit in the bank. The secretary kept all the books, and I did not make any entry upon the company's books myself. I assumed it was proceeds from the sale of stock. The company entered into a contract with Mr. Locker to sell some of its

(Testimony of Edward O. Howard.)

treasury stock, and I presume this is the proceeds of the sale of some of that stock. That contract was made nearly two years ago. I have not been informed as to the same only that it was from sale of stock. They told me that was what it was. [105] Mr. Janney did, I think. He did not say how much stock. I do not recall the exact details of the transaction.

I think Mr. Janney must have wired him for the money. I think he told me he did. There was no note executed for it. We do not keep a cash account showing receipts and disbursements of the company. The bank books would show the exact amount of money received. (Check shown, drawn November 17th, 1911, made payable to order of W. H. Shearman.) What was this for—I notice on the stub it says "$500.00 account principal; $187.50 interest to May 16, 1912, and $25.00 attorney's fees." There is still five hundred dollars owing on that loan. There must be still $1,000.00 unpaid. The mortgage was not released. It was placed in the hands of attorneys for collection and that was the fee. It was Mr. Shearman's attorney and the check made payable to Mr. Shearman. He is the city auditor.

The check drawn to the Windsor Trust Company for $406.90 was in settlement of their bill as transfer agents of the company. It had been running for some time. The checks in favor of the Western Union and Postal Telegraph companies are correct. The check drawn on Dec. 6th was to N. B. Robertson, a lady stenographer employed in Mr. Janney's

office. The check drawn to the Union Trust Co. for $250.00 was for services as Registrar of the company. It had been running some time. The only source of income the company has is the sale of treasury stock. I do not think any has been sold since I have been treasurer.

I have one hundred shares in the company. I acquired that two years ago, when I was elected upon the board. I got it from Mr. Janney, for $1.00, I believe. The only indebtedness I know of that the company has is the balance due W. H. Shearman. It may have had current bills owing, such as attorneys' fees, directors' fees, but no pressing obligations I know of. It is true that the company has liabilities amounting to $8,297.75. The directors voted a sum of money for their services amounting to $50.00 per month. (On asking if the board prior to the present one had a similar resolution, defendant objected on the ground that it was not in issue.) I think each of the officers received pay on the other board. (Objection, as it is mere assumption.) On the other board were R. T. Badger, C. S. [106] Varian, Mr. Clark, Mr. Edwards—I think—Mr. Freed. I do not know how long they served on the board.

I remember that there was a contract discussed, with Mr. P. D. Locker. That was before I was elected to the board. There were two contracts, but the one made on the French trip was made after the present board was elected. It was made in March, following the election in February—yes, that is cor-

(Testimony of Edward O. Howard.)

rect, I guess. (Letter dated Aug. 14, 1911, written to J. D. Skeen and signed by John Janney.) Yes, that is his signature. (Letter offered in evidence.) (Objection, as immaterial.) (Letter marked "Exhibit 1, J. W. C., Examiner," and copied now:)

Exhibit 1 [Letter, Dated August 14, 1911, Tenabo M. & S. Co. to J. D. Skeen].

Exhibit 1, J. W. C., Examiner.

Directors:	Officers:
Benner X. Smith.	W. Mont. Ferry, President.
W. Mont. Ferry.	John Pingree, Vice-Pres.
John Pingree.	John Janney, Secretary.
E. O. Howard.	E. O. Howard, Treasurer.
John Janney.	Cable Address:
	Tenaboms.

TENABO MINING & SMELTING CO.

105–106 Mercantile Block.

Salt Lake City, Utah, Aug. 14, 1911.

Mr. J. D. Skeen,

Kearns Bldg., City.

Dear Sir:—Please take notice that the meeting of stockholders of the Tenabo Mining & Smelting Company adjourned from July 15th to August 15th, 1911, will be held at 2 o'clock P. M. on that date at 105 Mercantile Block, for the purpose of passing upon the minutes of previous meetings and for the further purpose of considering a proposal contained in a letter from Mr. P. B. Locker of which the following is a copy:

"Tenabo Mining & Smelting Company,

105 Mercantile Block,

Salt Lake City, Utah.

Gentlemen: In view of the approaching meeting

of stockholders I would like for you to consider and if possible relieve me of my contract relative to the financing of your company. By this do not understand that I am abandoning the work, nor do I wish to do so. I would like at this time, however, to make another effort to have the company carry the expenses incident to its financing with the understanding that I continue the work in your behalf, that you pay the expenses of these negotiations and that I receive no commission.

I will willingly bear the burden of the work here, though I have already given two of the best years of my life to this corporation and its affairs, but as I have never accepted commission from other companies in which I am interested, I prefer this policy of work and if you will return to me the advances I have made up to this time in this matter, assuming such obligations as I have incurred in securing money which has been expended in getting to the point we have now attained, it will be a very easy matter to place the business on the same basis as the work I have done for other companies in which I am interested and which personally I very much prefer to the present plan.

In conclusion I would call to your attention that there are in the treasury something like 100,000 shares of stock which you are free to use and which, at the price provided in my contract—50 cents a share—could easily afford you adequate funds for such expenditures of money as have [107] been made to date and thus enable you to receive the entire proceeds from the sale of stock effected by me

(Testimony of Edward O. Howard.)

here, subject to my contracts with bankers and their agents here.

Trusting that stockholders will give this matter careful consideration, and with the hope that they will accept my suggestion, I am,

Very truly yours,
(Signed) P. B. LOCKER."

Yours very truly,
TENABO MINING & SMELTING CO.,
JOHN JANNEY, Secretary.

I have read that letter. I do not know whether a meeting was held subsequent to the date of that letter to act upon the request of Mr. Locker. I do not know whether the officers ever took any action in the premises at all. I do not know where Mr. Locker is now. Neither do I know when the company received any communications from Mr. Locker. I think he is trying to do something with reference to his contract with the company. Mr. Janney told me when he was in New York. (He produces letter.) (Other letters asked for, objected to by Mr. Edwards, but handed to counsel for complainant by witness.)

In order to get the minute-book or books of account of the company, it is necessary to get into communication with the secretary. The company's office is in Mr. Janney's office. We have not paid office rent at all. They paid the stenographer $100.00.

This is the original ledger sheet of Walker Brothers Bank. Shows a complete account with the Te-

(Testimony of Edward O. Howard.)

nabo Mining & Smelting Co., with the exception of one check, which will make a balance of one hundred and fifty dollars less than is shown here. The balance will then be $16.52.

(Following is complete copy of ledger sheet:)

Sheet No. 1. Walker Brothers, Bankers. Acc't. No. 30.
Name—Tenabo Mining & Smelting Co.
Address—E. O. Howard, Treas. 30.

Date.	Checks in Detail.	Total Checks.	Deposits.	Memo.	Bal.
1911.					
Nov. 17.			2900		2900
18.	712.50				2187.50
24.	26.32				2161.18
[108]					
28.	1.50	Ck. Book			2159.68
29.	25.83				2133.85
Dec. 1.	406.90				1726.95
6.	250.				1476.95
7.	25.				1451.95
11.	100.				1351.95
18.	100.				1251.95
20.	500.				751.95
21.	3.25				748.70
22.	7.18				741.52
Jan. 2–1912.	375.				366.52
15.	200.				166.52

As to this $2,900.00 from Locker, I do not think I could give you any other information as regards it. The company regards it as the proceeds of the sale of stock or an advance under this contract entered into with Mr. Locker. (Contract shown, dated March 5, 1910, with P. B. Locker.) (Copied here.) "It is expressly understood and agreed that the company shall in no way be liable for any fees or expenses for the listing of said stock, or trustee's fees and expenses or any other expenses whatsoever, and that

(Testimony of Edward O. Howard.)

each and every share of stock so sold shall net the company 50 cents per share."

I do not understand that the fees paid these two trust companies since receipt of this last money from Locker were accounts for bills that were contracted under that contract. (Mr. Edwards objects, not within the issues of pleadings.) They were bills contracted before that contract. They no doubt have stood for some time. I know of no other explanation for them. (Resolution of defendant company presented, dated the 8th day of February, 1911, and copied here:)

"Resolved that this company authorize the payment of $25,000 to the order of P. B. Locker from the money deposited in the Franco-Americane Banque to the credit of this company from the sale of the first allotment of one hundred and fifty thousand shares of stock, but not, however, until the entire allotment of one hundred and fifty thousand shares aforesaid has been paid for in full, and upon the condition that the said P. B. Locker deposit with the said Franco-Americane Banque fifty thousand shares of the stock of this company as represented by five thousand French bearer certificates of the denomination of ten shares each, heretofore loaned to the said P. B. Locker by the Tenabo Mining & Smelting Company for the purpose of providing funds for expenses," etc.

I do not know whether Mr. Locker received for himself any sum from the sale of any certificate at the time he sent this $2,900.00. I assume that [109]

money is from the sale of treasury stock. There was a Syndicate formed over there, as I understand it, and it may have been advanced by this Syndicate that undertook to underwrite this stock.

Cross-examination by Mr. EDWARDS.

This corporation had no regular meetings, that is regular times for their meetings. The by-laws did not fix any time. These meetings were held in response to telephone messages. I will not say there were never written notices, but I do not recall any written notices. I do not recollect ever having signed a waiver. I have not attended all the meetings. Yes, before the meeting, claims have been considered and also their correctness. Yes, I remember instances in which vouchers and receipts have been presented after the payment of claims against the company for consideration of the board, for the purpose of ratification. I have not read the minutes lately. I do not know what they contain at present. The minutes were always read and approved at the next meeting. I did not hear the name of the Franco-Americane Banque mentioned in connection with that money and receipt of same. I do not know positively where it came from. My answer was merely hearsay. I was not present at any meeting of the board when arrangements were made as to this money. Neither have I read the minutes of said meeting.

The amount of money owing to Mr. Shearman is not due until May 1st, I think. I do not know what the money paid to the Windsor Trust Co. was for. I

(Testimony of Edward O. Howard.)

do not know that Mr. Benner X. Smith is retained as the attorney for this company in this suit. I was not present at the meeting when same was taken up. The fact that the directors received $50 per month prior to my election was gotten from the books of record. All I know is in the books of record for the Tenabo Mining & Smelting Co. I have not seen the entry in the book of where any director received $50 per month. I do not remember of any payments of rent. It might be possible that some were made. (Witness being asked if he had been present at meeting of the board when resolutions had been adopted, answered No.) **[110]**

Redirect Examination by Mr. SHANK.

Those resolutions may have been adopted at a meeting at which I was present, but I do not think so.

Cross-examination by Mr. EDWARDS.

(Checks issued since Nov. 17, 1911, produced in evidence and copied here in full:)

Salt Lake City, Utah, Nov. 21, 1911.

No. 2.

WALKER BROTHERS, Bankers. 31–5

Established 1859. Incorporated 1903.

Pay to the order of Windsor Trust Co.

Tenabo Mining & Smelting Co. $406.90—Four hundred six and 90/100 dollars.

E. O. HOWARD, Treasurer.

(Perforated:) Paid.

(Stamped on face:)

Walker Brothers Bankers, Salt Lake City. Dec. 1, 1911. Paid through Clearing House.

(Stamped on back:) Pay to any Bank or Banker or order. Windsor Trust Company. 65 Cedar St., New York City. M. Tilden, Treasurer.

Pay to the order of any bank or trust Co. Prior endorsements guaranteed. Nov. 27, 1911. Franklin National Bank, Philadelphia. E. P. Passmore, Cashier. Paid through Clearing House National Bank of the Republic. Dec. 1, 1911. Salt Lake City, Utah.

Salt Lake City, Utah, Nov. 21, 1911.

No. 5.

WALKER BROTHERS Bankers. 31–5.

Established 1859. Incorporated 1903.

Tenabo Mining & Smelting Co.

Pay to the order of A. E. Raleigh $100.00—One hundred dollars.

E. O. HOWARD, Treasurer.

(Perforated:) Paid.

(Stamped on face:) Walker Bros. Bankers. Salt Lake City. Dec. 11, 1911, paid through clearing house.

(Endorsed on back:) A. E. Raleigh.

(Stamped on back:) Pay First National Bank, Elko, Nevada, or order. The Beowawa Mercantile Co., Beowawa, Nevada. Pay Continental National Bank, Salt Lake City, Utah. (All prior restrictive endorsements guaranteed.) The First National Bank, Elko, Nevada. C. F. Williams, Cashier, Continental National Bank, Dec. 11, 1911. Paid through Clearing House, Salt Lake City, Utah.

Salt Lake City, Utah, Dec. 6, 1911.

No. 6.

WALKER BROTHERS, Bankers. 31–5.

Established 1859. Incorporated 1903.

Tenabo Mining & Smelting Co.

Pay to the order of A. E. Raleigh $500.00—Five hundred and no/100 dollars.

E. O. HOWARD, Treasurer.

(Perforated:) Paid.

(Stamped on face:) Walker Bros. Bankers, Salt Lake City. Dec. 20, 1911. Paid through Clearing House.

(Stamped on back:) Pay First National Bank, Elko, Nevada, or order. The Beowawa Mercantile Co., Boewawa, Nevada. Continental National Bank Dec. 20, 1911. Paid through Clearing House, Salt Lake City, Utah. [111] Pay Continental National Bank, Salt Lake City, Utah. (All prior Restrictive Endorsements Guaranteed.) The First National Bank, Elko, Nevada, C. F. Williams, Cashier.

(Endorsed on back:) Pay to the order of Beowawa Mercantile Company. A. E. Raleigh.

Salt Lake City, Utah, Dec. 6, 1911.

No. 7.

WALKER BROTHERS, Bankers. 31–5.

Established 1859. Incorporated 1903.

Tenabo Mining & Smelting Co.

Pay to the order of N. B. Robertson $100.00—One hundred and no/100 dollars.

E. O. HOWARD,
Treasurer.

(Perforated:) Paid.

(Stamped on face:) P. Walker Bros., Bankers, Salt Lake City. Dec. 18, 1911. Paid through Clearing House.

(Endorsed on back:) N. B. Robertson.

(Stamped on back:) Pay to the order of any bank, Banker or Trust Co. All prior endorsements guaranteed. Dec. 15, 1911. International Banking Corporation. 11–30. San Francisco, Cal., 11–30. E. W. Wilson, Mgr. Continental National Bank. Dec. 18, 1911. Paid through Clearing House, Salt Lake City, Utah.

Salt Lake City, Utah, Dec. 6, 1911.

No. 8.

WALKER BROTHERS, Bankers. 31–5.

Established 1859. Incorporated 1903.

Pay to the order of Skeen and Skeen or John Janney $250.00—Two hundred fifty and no/100 dollars for a/c John Tyree vs. Tenabo M. S.

Tenabo Mining & Smelting Co.

E. O. HOWARD,

Treasurer.

(Perforated:) Paid.

(Stamped on face:) Walker Brothers, Bankers. Paid Dec. 6, 1911. Paying teller, Salt Lake City, Utah.

(Endorsed on back:) To pay't of Currency to Skeen & Skeen. John Janney.

Salt Lake City, Utah, Dec. 6, 1911.

No. 9.

WALKER BROTHERS, Bankers. 31–5.

Established 1859. Incorporated 1903.

Pay to the order of Skeen & Skeen or John Janney $25.00—Twenty-five and no/100 dollars.

Tenabo Mining & Smelting Co.

E. O. HOWARD,
Treasurer.

John Janney.

(Perforated:) Paid.

(Stamped on face:) Walker Brothers, Bankers. Paid Dec. 7, 1911. Paying Teller, Salt Lake City, Utah.

(Endorsed on back:) John Janney.

Salt Lake City, Utah, Dec. 9, 1911.

No. 12.

WALKER BROTHERS, Bankers. 31–5.

Established 1859. Incorporated 1903.

Pay to the order of Union Trust Co., N. Y., $375.00—Three hundred seventy-five dollars.

Tenabo Mining & Smelting Co.

E. O. HOWARD,
Treasurer.

(Stamped on face:) Walker Brothers, Bankers, Salt Lake City. Jan. 2, 1912. Paid through Clearing House.

(Stamped on back:) Pay to the order of The Philadelphia Nat'l Bank. Dec. 26, 1911. Union Trust Company of New York. Pay to the order of

any bank or trust Co. 3–1. Dec. 27, 1911, 3–1. Prior endorsements guaranteed. The Philadelphia Nat'l Bank. H. J. Keser, Cashier. Pay to the order of National Bank of Republic. Salt Lake City, Utah. Continental and Commercial Nat'l Bank, 28, of Chicago. 2–3. Nathaniel R. Losch, Cashier. Pay to the order of Continental and Commercial Nat'l Bank, 3, Chicago, Ill. 0. All prior endorsements guaranteed. Dec. 27, 1911. Philadelphia National Bank, Philadelphia, Pa. H. J. Keser, Cashier. Paid through Clearing House Nat'l Bank of the Republic. Jan. 2, 1912. Salt Lake City, Utah.

Salt Lake City, Utah., Dec. 19th, 1911.

No. 13.

WALKER BROTHERS, Bankers. 31–5.

Established 1859. Incorporated 1903.

Tenabo Mining & Smelting Co.

Pay to the order of Century Printing Co. $3.25—Three and 25/100 dollars.

E. O. HOWARD,

Treasurer.

(Stamped on face:) Walker Bros., Bankers, Salt Lake City. Dec. 21, 1911. Paid through clearing house.

(Perforated:) Paid.

(Stamped on back:) Pay to the order of **[112]** The Utah National Bank of Salt Lake City, Utah. Century Printing Co. Paid through Clearing House. Dec. 21, 1911. The Utah National Bank.

Salt Lake City, Utah., Dec. 21, 1911.

No. 14.

WALKER BROTHERS, Bankers. 31–5.

Established 1856. Incorporated 1903.

Tenabo Mining & Smelting Co.

Pay to the order of Utah National Bank $7.18—Seven and 18/100 dollars.

E. O. HOWARD,
Treasurer.

(Perforated:) Paid.

(Stamped on face:) Walker Bros., Bankers, Salt Lake City. Dec. 22, 1911. Paid through Clearing House.

(Stamped on back:) Paid through Clearing House. Dec. 22, 1911. The Utah National Bank.

Salt Lake City, Utah, Jany. 8th, 1912.

No. 15.

WALKER BROTHERS, Bankers. 31–5.

Established 1859. Incorporated 1903.

Tenabo Mining & Smelting Co.

Pay to the order of A. E. Raleigh $200.00—Two hundred dollars.

E. O. HOWARD,
Treasurer.

(Perforated:) Paid.

(Stamped on face:) Walker Bros., Bankers, Salt Lake City. Jan. 15, 1912. Paid through Clearing House.

(Endorsed on back:) Pay to the order of Beowawe, Mercantile Co. A. E. Raleigh.

(Stamped on back:) Pay First National Bank, Elko, Nevada, or order. The Beowawe Mercantile Co., Beowawa, Nevada. Continental National Bank Jan. 15, 1912. Paid through Clearing House. Salt

(Testimony of Edward O. Howard.)

Lake City, Utah. Pay to Continental National Bank, Salt Lake City, Utah. All prior restrictive endorsements guaranteed. The First National Bank, Elko, Nevada. C. F. Williams, Cashier.

I have not all the vouchers that went with the checks, but the package which I have handed you contains all I have in my possession. Said vouchers are as follows:

Nov. 17, 1911, W. H. Shearman, $500 on principal of note and $187.50 int. to May 16, 1912. $25.00 attorney's fees.

Dec. 8, 1911. Windsor Trust Co., transfer agent for certificates Nos. 1–250, 1001–2500, 2501–2594, 3001–3500, 4001–4225, 2569, and services, $406.90.

Dec. 11, 1911. A. E. Raleigh, assessment work done, $100.

Dec. 11, 1911. A. E. Raleigh, driving 50 feet tunnel, @ $8.00, $400. Sinking 13 ft. shaft, @ $8.00, $104, total $504.

Dec. 6, 1911. John Tyree, balance due for assessment work, $250. Interest and costs, $25. Total, $275. Notification under date of December 12, 1911, from the Union Trust Company that if bill is not paid, no more stock will be registered. Bill of Western Union Telg. Company for $25.83 for statements of June, Sept. and Oct., 1911. Paid Nov. 22, 1911.

Bill of Postal Telegraph & Cable Company, statements of July, August and September, $26.32, paid, Nov. 22, 1911. Check No. 5, under date of Nov. 21, 1911, was to A. E. Raleigh and was for assessment work done, he being an employee of the company and

(Testimony of Edward O. Howard.)

employed to do assessment work. Check **[113]** No. 6 is to the same person for the same purpose. Check No. 8, I think, is for the settlement of a claim of John Tyree's against the company, same being for assessment work, and a suit having been brought. Check No. 9 is for the costs of this suit.

Checks Nos. 10 and 11, to A. E. Raleigh, were for assessment work, but were never issued. Check No. 12 was for the services of the Union Trust Company as Registrar for stock one year and six months, $250 per annum, $375. Paid by me and issued by Mr. Janney. Check No. 13 to Century Printing Co. for $3.25 for 175 reports, to be sent to the stockholders. Check No. 14 to Utah National Bank, in settlement of overdraft, $7.18. That was to close the account with them which had been overdrawn. Gave check on Walker Brothers Bank. Check No. 15 to A. E. Raleigh, $200, assessment work. Check No. 16 to A. E. Raleigh for assessment work, $150. Check No. 7 to N. B. Robertson for stenographic work, $100. Services rendered by her as clerk and stenographer. Check No. 1, to W. H. Shearman, $500 principal, and $187.50 int. to May 16, 1912, $25.00 attorneys' fees; total, $712.50. The interest was paid up to 16th day of May, 1912. Check No. 2, to Windsor Trust Co., for services to the company as transfer agent to April 1, 1911, $250 and extra services, $156.90; total, $406.90. The item covered by this check was not to be paid by Mr. Locker under his contract. Check No. 3, to Western Union Telg. Co., June, Sept. and Oct. accounts, $25.83, for messages sent or received

by the company. Check No. 4, to Postal Telg.-Cable Co., for July, Aug. and Sept. acc'ts, $26.32, is for messages sent or received by the company.

There is about $150 yet due on the assessment labor for 1911 upon all mining claims of the company, to Mr. Raleigh. I think all the assessment labor for the year 1911 was done and performed upon the claims of the company.

Redirect examination by Mr. SHANK.

All the indebtednesses of the company are subject to demand for payment, but there is no definite time for payment to be made. Except the one thousand to Mr. Shearman, I know of no other that is not at the present due, I suppose. (Mr. Edwards objects—conclusion of witness.) No, everything **[114]** is not due. The attorneys' fees are not, neither are the directors' fees. These fees are due, but not at any special time. As to the $2,900, I have stated I do not know about it. I cannot tell how much is due the directors or what items make up the $8,200 the company owes. The company owes attorneys' fees, directors' fees—in the neighborhood of twelve hundred dollars. I do not positively know the indebtedness of the company at all. The payments I made to those two trust companies was discussed by the board at their meeting and frequently mentioned that they should be paid.

I never discussed with anyone the relation which these payments bore to the Locker contract. I do not know how much the company is indebted to Mr. P. B. Locker for.

(Testimony of Edward O. Howard.)

Cross-examination by Mr. EDWARDS.

Yes, I believe all the payments for which I signed checks or drew checks were honest obligations of the company. (Objection made, as irrelevant and not within the issues.)

Redirect Examination by Mr. SHANK.

I received $50.00 for one month's payment for directors' fees. The first month, in March, 1910. (Request made for books or accounts of company in witness' possession, but none were had.)

(Witness excused.)

(Taking of testimony adjourned until Wednesday, 21st day of Feb., 1912, 10 o'clock A. M.)

February 21, 1912, 10 A. M.

Complainant and counsel and defendant by counsel appear. Testimony continued.

[Testimony of William M. Ferry, for Plaintiff.]

WILLIAM M. FERRY, witness produced by complainant, testified as follows:

Direct Examination by Mr. SHANK.

My name is William M. Ferry. I reside in Salt Lake City. I conduct my father's estate, which consists in mining property, banking interest, etc. I have lived there since 1898. I am director in Walker Brothers, Bankers, also in the Utah Savings & Trust Co. Also a stockholder of the Tenabo Mining **[115]** & Smelting Co., holding 100 shares. I acquired same in early part of 1910, from Mr. John Janney, for about a dollar or thereabouts. I am president and director of the defendant company,

(Testimony of William M. Ferry.)

having been such since about the time I acquired my stock, practically two years. There is no regularly appointed general manager, the affairs of the company being conducted by the board of directors. I suppose I am really the executive officer. Mr. Janney is the one who carries out the directions of the board of directors. He is a director and the secretary of the company. I have held many meetings, formal and informal. I should say there have been held fifteen or eighteen meetings at least. Many informal meetings. I have never personally called a meeting. Mr. Janney had charge of that part. The details were left to Mr. Janney under the supervision of the board generally. (Objection, not best evidence.) All the minutes of the board have been approved with the exception of the last meeting. That was in November, 1911. The other members of the board were elected when I was. Yes, I received fifty dollars the first month. I have never seen this mining property. I think Mr. Janney has seen it. The secretary has kept the books of the company. Some of them were kept in New York by reason of the fact that we had a Registrar in New York. I mean the records of the transfers and the registration of the stock certificates. The secretary kept the minute-book, also the files and records. His office is 103 Mercantile Block, in Salt Lake City. Mr. Locker's name is on the door.

I have nothing belonging to the company except these two packages, which came from New York, and were in the Co.'s office until Mr. Janney went away.

(Testimony of William M. Ferry.)

He brought them to my office and left them there. They contain stock certificate books. There are 15 of these books: These embrace certificates that have been canceled as well as those that are unissued. Do not know who asked for them to be delivered to me. I think it was within a week or ten days before he left the city that he brought them over, about the 20th of December, perhaps. He was going to Virginia over the holidays. No discussion was had by the board as to his going. I do not remember what it was about. I think he intended doing some business for the company while there. He gave me his key. I tried to find the minute-book, but could **[116]** not. The desk was locked. The annual meeting of the stockholders was held on February 12th at two P. M. There was no business transacted. Mr. Benner X. Smith and I were present, and adjourned the meeting to March 11, and posted a notice to that effect on the door. I last saw Mr. Locker about two years ago. He went to France and has been there ever since. Mr. Janney has carried all communications with him. He would present same to the board. Frequently he addressed cables to the company. Mr. Janney accepted them. By virtue of an arrangement between the Tenabo Company and the Telegraph Company these cables were paid for by the company, and the company paid for the replies. We had confidence in him to do the right thing. We did not have so much confidence in Mr. Locker. So far as I know, there has been no question of his reliability. The company has been

strict but that is all. It was never known that Mr. Janney was interested in the Locker contract. Mr. Skeen told me of it, in our interviews. That was about May 11th. I do not know whether or not Mr. Locker is operating under his contract with the company. I have never seen contracts with relation to the acquirement of the properties of the Tenabo Consolidated Mining Co. by this defendant company, formerly owned by Locker and Janney. I knew before Mr. Janney or Mr. Locker was on the board that they had been closely identified together in a business way. My information was from general reports. I remember of hearing that they had sort of contract which sought to dispose of some stock, but I am not clear on that. I do not remember whether the board held a meeting after receipt of letter marked Ex. 1 or not. We considered it, but not seriously.

Yes, I know where the $2,900 came from that was deposited with the company. It came from either Mr. Locker or the Franco-Americane Banque to the company. I think they were cables. We took the money for it and said "Thank you." I presume the company issued stock for it. I don't know. The books of the company here would not show whether it had surrendered anything for that $2,900.00 or not. The contract provides that certain money shall be paid to the company into the bank—the Franco-Americane Banque—and upon the payment to the bank certain stock shall be released, and we have confidence in that bank. I have never seen any

(Testimony of William M. Ferry.)

contract with the bank but I **[117]** know we have confidence in it. I think there is a contract between Mr. Locker and that bank. I never saw it. I have seen one or two contracts which he has entered into with the Underwriting Syndicates. He presented those to the company. I have frequently asked Mr. Janney to correspond with him, Mr. Locker, as *to the* status of the negotiations were. Generally things were done when they were to be done. We have received about two copies of contracts from him I think. No, when we received the twenty-nine hundred dollars. I don't think we got any letter from Locker explaining it. I did not see any, that is. Yes, I guess there was a letter and probably one or two cablegrams, and I believe the board directed the Franco-Americane Banque to deposit by wire with its New York correspondent as soon as the money was received by them.

There was a resolution passed by the board directing the secretary to notify both Mr. Locker and the Franco-Americane Banque that there was a suit pending in this county for the appointment of a Receiver. It was spread upon the minutes. He did not notify the two fiscal agents—we did not have the contracts. No, we authorized Mr. Locker to enter into—as agent of the company—certain relations with underwriting interests. I wish to say that those underwriting contracts were not made direct with the company. I do not know whether the underwriting contracts were made by the authority to Locker under his power of attorney.

(Testimony of William M. Ferry.)

Cross-examination by Mr. EDWARDS.

Yes, I have only one hundred shares in this corporation. No, it is a fact that the small number of shares I have made me more careful, if anything. (Objected to as immaterial and incompetent.) The board of directors at all times considered all matters of which they had notice that involved the interest of the corporation. I have missed several meetings. I did not consider that Janney and Locker might be working together. I think that the contract Mr. Locker had with the company was absolutely fair. I think I was justly due the fifty dollars paid me the first month. The last number of certificates in the books was No. 4336. Dated March 18, 1911. Some of the books contain certificates which were not issued at all. For instance, Book J. The numbers of certificates not yet issued are 2702 to 2750, both inclusive. Book K, certificates Nos. 2751 to 3000, both inclusive, not issued. Book N, from [118] No. 3501 to 3750, both inclusive, not issued. Book O, from No. 3751 to 4000, both inclusive, not issued. Each book contained 250 certificates originally.

I have seen the pamphlet marked "Tenabo Mining Smelting Co." I saw it when elected director of company and many times afterwards. I saw it before elected to the board. At that time I knew Frank Knox, Heber M. Wells, William Spry, J. E. Frick, M. H. Walker and W. S. McCornick. Frank Knox is president of the National Bank of the Republic, at Salt Lake City. Heber M. Wells is Ex-Governor of the State and manager of the Utah

(Testimony of William M. Ferry.)

Savings & Trust Co. William Spry was and is Governor of the State of Utah. J. E. Frick is Supreme Justice of the State of Utah. M. H. Walker is president of Walker Brothers Bankers in this city. W. S. McCornick is president of McCornick & Co., bankers of this town. (Objection made—not proper for cross-examination.) I know Mr. McVichie. He is consulting mining engineer, well known and reliable in the western country. I knew Mr. Llew. Humphreys at the time I read the pamphlet. He is also a competent mining engineer. I read, at the time I saw this pamphlet, a letter bearing date Jany. 30, 1909, to P. B. Locker, signed by Llew Humphreys. I read also the letter dated Jan. 27, 1909, to Tenabo Mining & Smelting Co., signed by W. S. McCornick. I also saw the letter TO WHOM IT MAY CONCERN, signed by Heber M. Wells. I saw letter to H. P. Clark, Cashier Commercial National Bank, signed by David Keith. Mr. Keith is one of the most prominent citizens in our community, a man of great mining experience. Read letter to Dr. H. Waggoner, signed by R. W. Schultz. I do not know him. Read letter signed by David L. Rockwell to Chas. P. Salen. I do not know him. Read letter TO WHOM IT MAY CONCERN, addressed by H. P. Clark, R. T. Badger, H. C. Edwards, C. S. Varian and Lester D. Freed. I know each of them. Read report to Board of Directors of Tenabo Mining Smelting Co., Salt Lake City, signed by A. H. Brown. I do not know him (Brown). I have always believed all statements to be true.

(Testimony of William M. Ferry.)

Yes, the board instructed Mr. Janney, its secretary, to inform the Franco-Americane Banque after the first bill in equity was instituted that action had been taken. We either told Locker or the bank. We told either Locker or the bank that no more certificates would be delivered until the **[119]** further order of the board, due to the pendency of this action. These certificates were in the hands of the Franco-Americane Banque, I think. They were "bearer certificates," issued by the trustees in New York City, certifying that certain shares of stock were held there in trust and that this certificate ran to the bearer of it and entitled them to the interest in the stock which was deposited with the trust company in New York. Prior to the time this $2,900 was received, the board permitted to be sold a certain number of shares of stock to raise this money. (Objection—not best evidence.) We had communications from Mr. Locker, our agent in France. (Objection.) And move to strike out the answer for the reason that it is not the best evidence. I supposed that the money must be paid before certificates were issued. I was never at any meeting at which the resolution in the minutes marked Ex. 3 was read.

(Recess until 2 P. M.)

I am a director in the Silver King Coalition Mines Co., at Park City; a director in the Mason Valley Mines Co., in Mason Mountain Dist. of Nevada, and director in the Yosemite Mining Co., at Bingham, Utah. Also director in a few smaller concerns.

The meetings held by this company were always

(Testimony of William M. Ferry.)

long. The board always went thoroughly into the details of all questions. I have *never influenced* by what Mr. Janney wanted any more than that of any other director. I was governed by my judgment of what I thought was most advantageous to the stockholders of the corporation.

Redirect Examination by Mr. SHANK.

I took the position that, as a director, I should protect the interests of the stockholders to my best judgment and ability. Mr. Edward O. Howard asked me to become a director in this corporation. I was supposed to have some little knowledge of mining affairs and was a friend to him. I did not know that Locker was indebted to the Walker Brothers Bank. I might have known that Janney was. I occasionally examined the notes and securities and affairs of the bank, being on the executive committee of the bank, and a member of the board of directors. I came into this corporation because Mr. Howard asked me to do so.

I want the Court to understand that I think possibly I may have known [120] that Janney was indebted to Walker Brothers Bank, as I occasionally took part on a committee to examine the notes and securities of the bank, being a member of the executive committee and a member of the board of directors of the bank, and I think that it may be that Janney was indebted to the bank about that time. I want this record to show and the Court to understand that with these large interests which I represent, I came into this corporation upon a one to ten dollar investment, and assumed these responsibilities purely be-

cause Mr. Howard asked me.

But I had no idea that the responsibilities connected with the matter were as heavy as they have been. I have not asked to resign. I do not know if Mr. Locker was indebted to anybody. I do not know that Mr. Janney owed the Walker bank anything. I did not know anything of the Locker contract until after I became a director of the company.

I understand that the French Bourse, upon representations substantiated and upon payment to the government, permits stock to be listed. That extends only to such stock as application is made for, and does not affect or afford a market for stock other than that particular bunch of stock or number of shares which has been represented and which had been paid for and the fees for which have all been attended to. In other words, the stock which we are negotiating to sell to the amount of four hundred and fifty thousand shares, if it should be sold, or should become listed upon the Bourse or Curb, would be the only stock which would be permitted by them to be dealt in, and such stock as we held, or such stock as might be in France or any other country, would have no standing in the market at all. The 450,000 shares of stock is in the hands of the Windsor Trust Co. as Trustee. However, the contract may provide that it may be put in the hands of the Franco-Americane Banque. The contract covering the disposition of the stock, the bearer certificates which are distinct from the stock of the company are in the hands of the bank, while an equal number of shares representing that issue

(Testimony of William M. Ferry.)

would be in the hands of the Windsor Trust Co.; so that these certificates may, at the option of the buyer or owner, be transferred and exchanged for this Trustee stock which is in the hands of the Windsor Trust Company. That is my understanding of it. This is all covered by a contract between the company and the Windsor Trust Co., or perhaps a contract [121] between the company and Locker, or else a contract between Mr. Locker as the representative of the company and the Windsor Trust Co., direct. I think I have seen them in our office. I rather think it was the Windsor Trust Co., and the Tenabo Mining & Smelting Co., in which they act as Trustee for this 450,000 shares. I, as president, would have signed it. But I don't remember signing it.

I think the Windsor Trust Co. has the 450,000 shares of stock. I don't know if they have them all or not. I don't know if they were transferred to the Banque or not. I have never seen a French bearer certificate. The only thing I know is that we received $2,900, and some dollars for some. I have never asked Mr. Locker or the Banque to account upon those sales. I have examined the books and think all are signed, that is, in books J, K, N, O, and Q. They have also been signed by Mr. Janney. The registrar and transfer agent both have to check them and affix their signatures before they are negotiable, or properly issued. The company requires those signatures before the stock becomes issued. I do not know where stock books B and C are. I do not know how many stock certificate books we issued, nor how

(Testimony of William M. Ferry.)

many shares of stock were originally printed or lithographed, nor how many I signed as president, but I think several thousand. I think two thousand shares of stock were lithographed for the company, originally. I do not know to whom Cert. No. 106 was issued. Neither Nos. 110 to 129, inclusive. They appear in the blank. I do not know to whom Nos. 131 to 152, inclusive, were issued to. Neither 154 to 156, inclusive. Neither 158 to 168; 170 to 204; 206 to 208; neither Nos. 1039 to 1200; 1454; 1455; 1457 to 1460; 1462 to 1500, both inclusive. I do not know to whom or for what amount 1502 to 1750 were issued, nor where the certificates are at the present time. My answer is the same as to all the stubs of certificates from which the certificates are taken. They were all signed by me. I do not know to whom they were issued. 1752 to 1950, inclusive; 1957 to 1960, inclusive; 2023 to 2031; 2043 to 2141, inclusive; 2143 to 2193, inclusive; 2200 to 2241, inclusive; 2246 to 2250; 2252 to 2450, inclusive; 3213 to 3250; 2502 to 2592; 2596 to 2674; 2676 to 2679, inclusive; 2693 and 2694, and 2696 to 2699; 3252 to 2410, 3412 to 3415; 3416, 3417, 3418, 3419 and 3420. They were signed by [122] me; 3436 to 3494. I do not know to whom they were issued; 3496 to 3500, 3252 to 3500. All the others being 4096 to 4197, 4149 to 4171, 4172 to 4196, 4198 to 4222, 4432 to 4250, 4252 to 4360, I do not know to whom they are issued unless the name appears on them. 7604 shares were issued to M. H. Walker, of Walker Bros. Bank.

The last stockholders' meeting was held on Feb.

(Testimony of William M. Ferry.)

12th of this year. I think there was one in May, 1911. I was present but Mr. Benner X. Smith presided. I was late. There was a little trouble and the Anti-Tyree faction elected the board. I was an anti. I was delayed, and when I arrived I found that Mr. Smith was in the chair and Mr. Price, an attorney, was apparently representing the Tyree interest. Mr. Skeen and Mr. Janney were there; a committee on credentials was appointed, and Mr. Price made some strong remarks, and an adjournment was had, in which the committee examined the credentials and when the meeting reassembled and reported, the report was adopted; thereupon an election for the board of directors for the ensuing year was had, and different sets of nominations were made, and the election was had. The chair declared the present board of directors elected. I am sure the minutes would show what Mr. Price would want spread upon them. Mr. Price had proxies from several men, and wanted to control the election. Those credentials are supposedly filed in the secretary's office.

Cross-examination by Mr. EDWARDS.

Yes, the committee on credentials made a report recognizing the majority of the stock as being entitled to be voted against the Tyree interests, but finally there was a majority of the stock represented at the meeting voted for the election of the present board, and since that time no action has been taken by the parties that Mr. Price voted the stock represented by him at the election to question the election

(Testimony of William M. Ferry.)

of the present board.

Yes, it is true that all the certificate books signed by me and by Mr. Janney had been forwarded to the Windsor Trust Company. All stock certificates issued from those books were issued and torn from those books after the Tenabo Mining & Smelting Co. had transported the books to the Windsor Trust Co. I do not know whether Mr. Janney kept a stock ledger or not. I think the Windsor Trust Co. rendered statements at intervals to Mr. Janney [123] as to the number of shares evidenced by each certificate that was issued by it. I never paid any attention before to the stubs on some of the certificates not being filled out. I do not know why they were kept blank. All of them had engraving on them.

Redirect Examination by Mr. SHANK.

(Ex. 4 made and attached to deposition.)

That is the general form used by the Tenabo Mining & Smelting Co. The reports from the Trust Co. came in sheets with the proper certificate showing the status of the stock issue of that date. I know Mr. Janney received them, but I do not know where he kept them.

Cross-examination by Mr. EDWARDS.

That is the form (Ex. 4) in manner of engraving and general aspect of the certificates.

(Witness excused.)

[Testimony of John Pingree, for Plaintiff.]

JOHN PINGREE, witness produced by complainant, testifies:

My name is John Pingree. I reside at Ogden. I am cashier of the First National Bank, having been such since Jany. 1904. I have resided in Utah all my life. I became identified with this company the early part of 1910—the latter part of February, I think, as an officer. I had one hundred shares in the company. I paid nothing for it. It came through the mail to me. I think it came from Mr. Janney. It was about the time I was elected upon the board of trustees. Mr. Janney asked me to go on the board of directors. He said that on account of holdings I had and on account of the change in the board that he would like me to serve. I have met Mr. Locker, I first learned of the contract of Locker's at the directors' meeting. It was generally discussed. I don't remember whether or not Mr. Locker was present. I do not know that Mr. Janney represented Mr. Locker, but he brought up all matters generally. I attended three or four meetings. I remember Locker was at one meeting before he left for Paris. Both Mr. Locker and Mr. Janney presented the matter of the Locker contract to the board. I made no inquiry as to the prior condition of the company, or of Mr. Locker or Mr. Janney. I understood that Mr. Tyree had the swing of the previous board. That what the reason for the change. I had heard something [124] to the effect that Locker had transferred his holdings in the Tenabo Mining & Smelting

(Testimony of John Pingree.)
Co. under the name of the Tenabo Consolidated Co. I had heard that the holdings Tyree transferred to the company were the Gem Consolidated. I never knew that Tyree had elected three members on the board and Locker two. All I know is that one day I was called and asked if I had objections to being left off the board for the reason that they wanted to put Mr. Skeen on, and I said "No"; that it was entirely agreeable to me, and I had not heard anything to the contrary and I never have requalified, and if I am a member now, it is simply from the fact that Mr. Skeen did not qualify, and if he has, perhaps I am not a member. I am not active, and have not been active since the early part of 1911. I have not attended a meeting since the early part of 1911. I have ceased interesting myself in any way, shape or form with the transactions of this company since the early part of 1911. Know nothing of the transactions of the company. I know nothing of the receipt of any money. They always seemed to wonder where the money was coming from. They always needed money.

I was present, I think, when the contract with Locker and the power of attorney were considered. I cannot say I was very favorably impressed with it, but it seemed the only way to do what we wanted, to get the company fifty cents net for stock. I do not know what the stock had been selling for prior to that time. Locker was to net the company 50¢ per share on the French market. I heard the machinery of it discussed in the directors' meeting, and it met

(Testimony of John Pingree.)

with my approval. I do not know anything of Mr. Locker's deals or whether he ever sold any stock. I know nothing about the company, have had no knowledge as to where the books were kept, how they were handled, the contract or agreement with the Windsor Trust Co., or the French Banque, and have never had anything to do with or seen the books of the company. I do not know where Mr. Janney is.

Cross-examination by Mr. EDWARDS.

I did hold a large block of stock in the Gem Consolidated Mining Co. Together with my associates, I held some 80,000 shares. We exchanged our stock in that company to stock in the Tenabo Company, on the basis of three to one, I think. Three shares of Gem for one share of Tenabo. I knew Mr. Janney only casually at the time I was elected to the board. Did not think of in any way trying to engineer the affair when I went in. I did not think the Locker contract was especially advantageous to the company, but thought it was the best we could do with anyone at the time. I think I attended from eight to ten meetings of the company during the year. Most [125] of them were long.

I have always thought the mining properties valuable. I know Duncan McVichie, Llew Humphreys, and think they are very fine mining authorities and trust them implicitly. They are both of fine reputations in this country. I thought the mines were so good that I made a loan on them. (Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.) It was made on the stock

(Testimony of John Pingree.)

of the Reliance Mining & Milling Company, on 200,000 shares of it. I got some 50,000 shares from Tyree.

Redirect Examination by Mr. SHANK.

I was never able to get my stock in the Gem Consolidated transferred to my name. Most of it is in the name of Hiram Tyree. I tried several times, but they always told me the stock issued in a certificate in their name, but it was in the pool agreement. Tyree and Locker made that agreement. I know nothing about the terms of that agreement. I haven't any idea when that pool agreement will be closed so that I can get my stock, or whether I will ever be able to get it. I received one check for $50.00 and did about three or four hundred dollars' worth of work, I think. I paid out a great deal in railroad fares.

Cross-examination by Mr. EDWARDS.

I do not know anything about who named the different directors. (List of stockholders offered in evidence and ordered copied by Examiner and attached to these depositions as an exhibit in this case. Marked Ex. 5.)

(Adjournment until Feb. 22, 1912, 10 A. M.)

Thurs., Feb. 22, 1912.

[Testimony of Benner X. Smith, for Plaintiff.]

BENNER X. SMITH, witness for complainant, testified:

My name is Benner X. Smith. I reside in Salt Lake City, Utah. I am an attorney at law. Ad-

(Testimony of Benner X. Smith.)

mitted to the bar in New York City in June, 1892. Have practiced here since Sept., 1892, with the exception of the year 1898, when I was in the army. I am a director of the Tenabo Mining & Smelting Co., and also its attorney. I have been such since February, 1910, shortly after I was made director. I owned one hundred shares of stock in the company. I got the certificate from John Janney. It appeared to have been transferred [126] from Arthur Johns. I think possibly I paid a dollar for it. Mr. Howard and Mr. Janney jointly requested me to become a director. Our firm has never done any business for Walker Bros. except a few little collections. I had known Mr. Janney slightly and Mr. Howard very well. Howard stated to me in a general way about the company and that he had suggested to Mr. Janney that I go on the board, and said Mr. Janney was reorganizing it, and he had told Mr. Janney that if they would make our firm their attorneys, probably I would go on the board. I investigated the mine, as I did not want to be mixed up with a wild-cat mining prospect, and I looked over the prospectus and talked with Mr. Duncan McVichie about it, as he was a mining engineer and would know more about it. I think I talked with Mr. Ferry also. I did not know Mr. Locker at that time, although I knew him by reputation. I first learned of the arrangement with Mr. Locker for the sale of stock about the time we were elected on the board, or shortly afterwards. The French contract was brought to the board's attention shortly after we were elected, by Mr. Janney, to-

(Testimony of Benner X. Smith.)
gether with a form of a trust agreement which would provide the machinery for the issuance of bearer certificates and placing them upon the French market, and some correspondence from a New York firm, who approved the form of the contract. I drew the French contract, following to a great extent the form that I have spoken of. Mr. Janney presented that form to me. I had discussed the form with Mr. Locker and with Mr. Janney to some extent. The board was elected on the 8th or 9th of February, and five certificates of stock of a hundred shares each were placed in my hands, as also in the hands of other directors, and I sent them to the Windsor Trust Co. for transfer. I received a reply from them. Yes, I have it here. (Hands letter to counsel.) The power of attorney was a special one given to Mr. Locker. There was a time after the Locker contract when Mr. Tyree commenced to interfere, and I don't know but what it was at that time that I received the information of the issuance of some stock, I don't remember how much, to the Gem Co. I was told, I think, that it was issued to the Gem Co., and went into the manual possession of Hiram Tyree. (Objection, hearsay.)

At the time of the filing of the first bill in equity by Mr. Skeen against this company, there was some conversation with Mr. Skeen with [127] reference to some notes that were given at some place in New York. It seems that it was in Cornell—no, Hornell. I do not recollect the person as being Adsit. It was in May or June, 1911. This was called to my attention, tending to show the connection of Mr. Locker

(Testimony of Benner X. Smith.)

and Mr. Janney, that is, their connection with each other and their participation in that transaction that was referred to. (Note handed to him.) All I recollect about that note was that it was endorsed by Hiram Tyree, P. B. Locker and John Janney. I don't remember the endorsement of the company on it. I was told, on my election to the board, that all the directors would receive fifty dollars per month. I received fifty dollars. I think our firm received $150.00 as attorney's fees. It was in 1910, I think, I have not seen the property. I have produced all the documents which I have connected with the company. They consist of drafts of contracts, drafts of minutes of meetings, form of a trust agreement between the Windsor Trust Co., and the company and others. I have one passed upon by Coudert Bros. I think there were some modifications made in it. It was not executed as it is there. I did not draft it; it was sent me by the Windsor Trust Co. It came from a firm of lawyers in New York, I suppose. A letter from Coudert Bros. came with it. I think it came to Mr. Locker. I suppose Mr. Janney has the letter. (Note marked Ex. 6.) (Objected to unless offered in evidence.) This form of trust agreement was followed, with some modifications, when the agreement was finally executed. (Objection, incompetent.) The Locker contract was drawn up by me after he (Locker) had stated to the board different propositions. Several of them were turned down by the board. I drew what is known as the French contract following the form of contract presented to the

board by Mr. Locker. I think there is a correct copy of the contract with the Franco-Americane Banque in the office of the company. The form is incorporated in the special power of attorney for Locker. He, I suppose, has reported what he has done under the power of attorney for the company, and what contracts he has signed. That would be in the minutes, I think, or the files. One time, I suggested to the board that I thought he ought to report direct to the company, as he always reported to Mr. Janney. I think the company received a report as to the number of certificates sold in Paris. [128]

In November, 1911, it was made after arrangements had been made with the board to direct the Franco-Americane Banque release, upon payment of a certain sum of money, certain bearer certificates, and the bank was directed to so release, and the company received the money. I think thirty thousand shares were ordered released for three thousand dollars. Locker was to receive no share of this amount. We received that amount, less the cost of remitting it. It was carried on through Locker. There was a resolution passed and I presume it is in the minutes of the board. I do not know of any release reported to the board. I do not know that the company has received any letters from Mr. Locker since receipt of that money. We had to have funds to do the assessment work upon this property for 1911, and the matter was taken up by the board, and Mr. Janney was directed to advise Mr. Locker of the situation. We were advised that there could be

(Testimony of Benner X. Smith.)

funds raised if we would release this amount of stock. Mr. Janney advised me. He said he took the matter up with Mr. Locker. I am sure the books will disclose all, as I helped draw up the minutes. I do not know where the books are. Mr. Janney has never gone away before that I know of without leaving the key to his desk with someone.

He has never before locked his office and gone away for weeks and not reported to counsel for the company or the board of directors, or other officers, anything about the minute book or about the records of the company. I do not know whether his office is kept up while he is away or not. We have not had a directors' meeting since Mr. Janney left. I do not know to whom those French bearer certificates were sold. I don't know whether Locker got anything out of it or not. We were satisfied in order to raise this money to let those certificates go. We expected to sell enough of Janney's stock in order to make up the difference between that and that which we received from those bearer certificates at fifty cents a share. It is all spread upon the minutes. I generally draw up the minutes. I know of no other contracts with Locker except as set out in Exhibit No. 1. That was a request to be released from the contract. The board turned it down. [129]

Cross-examination by Mr. EDWARDS.

I had no understanding with anyone of any kind by which I was not to exercise my honest discretion in transacting business of the company. I have *taken used* my best judgment and have used more

(Testimony of Benner X. Smith.)

care than I would have in some instances where I had larger holdings. The objection is found on page 25 of Smith's deposition as incompetent and self-serving. I don't recall who told me that the stock of the Gem had been delivered to Tyree. I know Mr. Tyree was one of the officers of the Gem Co., and I assumed that he got the stock. The promissory note for $5,000 was signed by the Gem Consolidated Mining Co., by Tyree as president, and by the Nevada Phoenix Mining Co., by Locker, as president, and by the Tenabo Consolidated Mining & Milling Co., by Locker, as president. It was not signed by the Tenabo Mining & Smelting Co., to my knowledge.

No, I do not remember what parts of the form of the Trust Agreement was used by me in drawing the contract which was ultimately executed. Instruction was given by wire, I think, to the Franco-Americane Bank to deliver bearer certificates upon payment of three thousand dollars. Miss Robertson had constantly been in Mr. Janney's office, so far as I know, since I have been director. I have frequently called at the office for copies of papers. Miss Robertson is at present in Nevada, on a vacation.

Redirect Examination by Mr. SHANK.

I do not recall that Mr. Tyree executed a note of the company to Mr. Bloom for *thirty-five thousand* $35,000.00. Mr. Skeen spoke of many matters to me and he might have mentioned it, but I do not remember it. I have heard that there was a block of stock, 135,000 shares, disposed of by Mr. Tyree, putting it up as collateral upon a note and borrowing money

(Testimony of Benner X. Smith.)

on it, and I believe the stock was converted under the terms of the note for nonpayment of the note. Yes, I know of that. That happened before I was connected with the company. I don't know whether there is at present outstanding an obligation of the defendant company executed by Hiram Tyree or not. That was not the note of Hiram Tyree. Some individual in New York executed it, and this stock was pledged as collateral and the money was raised on it, but it wasn't the note of the company. [130]

Cross-examination by Mr. EDWARDS.

I really don't know anything about that note of my own knowledge. I remember there is a record in the minutes of the company of a contract given to Mr. P. B. Locker. Yes, I remember of hearing something about Tyree and Locker having hypothecated one hundred thousand shares of stock bought from the company as collateral and that the other shares of stock had been retained by them for their personal use. There has never been a demand on the company by Bloom or anyone else holding a note purporting to have been executed by the company or anyone on its behalf.

Redirect Examination by Mr. SHANK.

The mortgage of fifteen hundred dollars was placed in the hands of Salt Lake lawyers—I think C. S. Price. There was $500 paid on it and interest to May 16th and was extended. I presume Mr. Raleigh is in charge of the mines now. He received no salary. He does our assessment work and looks over matters generally.

(Recess until 2 P. M.)

[Testimony of Charles S. Varian, for Plaintiff.]

Mr. CHARLES S. VARIAN, witness produced by complainant, testified:

My name is Charles S. Varian. I reside in Salt Lake City. I am a lawyer; have been for 40 or 41 years. Have had an office here since 1883. I have always considered myself not a stockholder. I had a hundred shares. H. P. Clark, Rodney T. Badger, Lester Freed, H. C. Edwards and myself were the incorporators of the company. Mr. McCornick, Mr. Tyree and one or two of the above-named gentlemen asked me to go in. I was a subscriber for stock, 100 shares, but do not know that I ever received a certificate for it. I have no recollection of having the certificate or transferring it, unless I transferred it to the secretary of the succeeding board, Mr. Janney. I dismissed it from my mind and never thought of myself as having any stock in it. I think Mr. Clark was elected president and Mr. Badger secretary and treasurer. I was appointed counsel. I was director until about the first of February, 1910. I wanted to go out because I found that it took so much time, and the property was situated in Nevada, and the stock was **[131]** being dealt with on the market, not safely, and after we had succeeded in paying off that mortgage, I concluded I wanted to get off and out. It all related to the placing of the stock. I believe the Locker and French contracts were pending several months before I resigned. I made up my mind I would not execute it. I think that contract was executed in March, 1910. I find here my office

(Testimony of Charles S. Varian.)

copy of the record of meeting of directors on Oct. 4, 1909, referring to the contract previously made with Locker and cancelled here. It is as follows:

"Upon motion of Director Edwards, seconded by Director Freed, the following resolution was unanimously adopted: Whereas, an option contract for the sale of 600,000 shares of the treasury stock of this company by P. B. Locker was made by and between this company and the said Locker, on the 14th day of January, 1909; and whereas, the said contract was not complied with, nor fulfilled by the said Locker, and was cancelled by resolution of this board taking effect on the 15th day of July, A. D. 1909, and due notice thereof in writing given to said Locker and Hiram Tyree and J. W. Janney, assignees of an interest in said contract; and, whereas, by resolution adopted by the board on the 19th day of July, A. D. 1909, the said Locker and the said Janney were appointed the agents of this company, with authority to sell for cash at not less than fifty cents per share, the remainder of the treasury stock of this company, yet unsold of the block of 600,000 shares, authorized to be sold by the aforesaid contract of January 14th, A. D. 1909; and, whereas, it was, by said last mentioned resolution, provided that the authority thereby conferred upon said Locker and said Janney should terminate, and be considered revoked without further action of this board, upon the expiration of sixty days, from the said 19th day of July, A. D. 1909, and, whereas, an indebtedness of approximately $20,000.00 (including interest), charged against the 'Gem,'

(Testimony of Charles S. Varian.)

'Reno,' 'Ollie' and 'Winnemucca' mining claims, the property of this company, by mortgage in favor of W. S. McCornick is past and due, and in suit for foreclosure in the District Court for Lander County, State of Nevada, and, whereas, a suit is also pending in said court for the foreclosure of a miners' or laborers' lien filed against the said last above-named property to recover the sum of $2,779.00 with $500.00 attorney's fees, interest and costs, and, whereas, the annual work to be done upon the fourteen mining claims, the property of this company, has not been done for the current year, and must be done by and before the first day of January, A. D. 1910, and the sum of $1660 is required for the performance and superintendence of said work; and whereas, this company has no money for the satisfaction of the aforesaid claims and charges, or for such part thereof as may be found to be justly chargeable against the company's property, and it is necessary that the company should have immediately the sum of $25,000.00 for the purposes aforesaid and its necessary expenses and charges; and whereas, the company has no other means whereby to procure said or any sums of money other than by the sale of its treasury stock;

Now, therefore, be it resolved: That this company offers for sale and will sell for the sum of $25,000.00 in cash, so much of its treasury stock yet unsold as may be necessary to procure said sum at once, and hereby invites bids from responsible persons for the same; provided, nevertheless, that no stock shall be sold, issued, or delivered, until and unless, the amount

(Testimony of Charles S. Varian.)

of money to be paid to this company for the entire number of shares [132] hereby authorized to be sold shall aggregate the full sum of $25,000.00; the intention being to sell no more of the treasury stock, unless enough shares can be sold to net the company said sum.

And the secretary is directed to forward certified copies of this resolution to the Windsor Trust Company.

P. B. LOCKER,
J. W. JANNEY and
HIRAM TYREE."

I recollect no contract after that disposition of the matter was made, but there was one asked, as I remember, requested by Locker, which involved the putting of the stock of this company on the Paris Bourse, subject to the rules and regulations and the laws of the department of the Seine, or of Paris; and we refused to do it. I did not want to execute it because I had no confidence at that time in the agent, P. B. Locker. I do not remember whether Exhibit No. 1 is a contract similar to the one asked from the board for the sale of these certificates in Paris or not. I do not remember or know anything of a power of attorney to Locker. The resolution just read was passed on October 4, 1909. The money procured came through McCornick & Sons in New York. The record shows 165,000 shares *deliver* up for $25,000, I believe. I don't know positively how many. I never heard that Tyree kept ten thousand dollars and also sixty-five thousand shares. I think we refused

to release the Gem or Reliance stock. The 450,000 shares of stock issued to the Gem Co. were deposited in either the first or second trust company. I don't know what relations existed between Tyree and Locker, but I was convinced that they were working together against the company and I said as much in one of our directors' meetings. I think I have letters bearing on these matters, but I have not had time to gather them together. I will not allow those letters taken away from me. They are for my protection.

I defended an action brought here in 1909 against the Tenabo Co., making charges against the directors of both companies. I found it very difficult to dispose of the stock of this company. All I know about the French contract is that it was presented to the board by Mr. Janney and was turned down. When we organized the company, we did not have any money, and Mr. Locker paid all the expenses necessary to start the office with, and we subsequently reimbursed him. We gave him a contract to sell this stock at fifty cents a share. The board voted a salary of $50.00 per month to the secretary and gave Lester Freed and Clark—I don't remember whether Edwards got it or not. My salary was fixed at fifty dollars, with the [133] understanding that it did not include suits in court or litigation. The $1,025.45 paid to Mr. Edwards was, I think, fees in the foreclosure of that mortgage. Yes, I received $700.00 prior to the time that I resigned. I do not know about the money paid to the various officers. Mr. Clark did much work in

(Testimony of Charles S. Varian.)

employing men to work, etc. He saw that the assessment work was done and that the secretary's work was done. We made all the efforts we could to sell the stock with the market 2,000 miles away. Besides the 2,250 shares for which they were paid $1,687.50 and the 165,000 shares for which they were paid $25,000, there was some stock sold in New York and accounted for by the Trust Companies. Locker sold some stock here to Hagenbarth and Frank Knox, I think. He either turned it in or accounted for it.

Cross-examination by Mr. EDWARDS.

All the capital stock was paid for by the stockholders. All the stock books were sent down to New York before any stock certificates were issued. I don't remember ever having a stock certificate myself. I did not receive one from the Trust Company. I never assigned any. Yes, at the meeting had with reference to the French contract, I made it very clear to Mr. Janney just what I thought about it. I said we would not transact any more business for the corporation with Locker or Janney. He, Janney said, "Why don't you get out then?" We said we would as soon as they could find another board to succeed us. I said we would not appoint anyone connected with Tyree or Locker. The names presented were Benner X. Smith and E. O. Howard, whom I knew very well. Also Mont Ferry and John Pingree, of Ogden, and Janney himself.

I read the contract over, and took it home and studied it some more, and became convinced that I would not stand for it. The French board was too

(Testimony of Charles S. Varian.)

far away and I did not think the company was in a position to comply with the laws of France as to expense, or as to the supervision of the sale of the stock. I stated my position to the board next day, and they all agreed with me. This contract was not the same as the one presented to the former board. This contract involved the expenditure of considerable money for office, etc. I did not think the company could afford to undertake such a thing as that. **[134]** Locker's contract was at first only to sell stock. We cancelled that and before that there was an option. A number of contracts were turned down. Every matter presented to the board was thoroughly discussed before they were acted upon.

When I became a director in this corporation, I knew that McCornick & Co. had instituted suit to foreclose a mortgage that had been given to them upon the Little Gem mining claim, and we sent to get an abstract of title to the properties and one of the deeds—to the Ollie and Winnemucca—was not included. We never discovered it for a year. That was one of the things I told Tyree about in a letter and he said he didn't know anything about it. We afterwards found that the deed had been executed and deposited with W. S. McCornick in escrow to be delivered to Gallagher when a certain sum of money was paid as the remaining portion of the purchase price. A part of the $25,000 which was received from the sale of the stock of the corporation was used for the purpose of paying up the balance of the pur-

(Testimony of Charles S. Varian.)

chase price and having a title vested in the defendant corporation.

I remember there was a lien—mechanic's—that was not in the abstract. It was made by a man named Seeman, in Philadelphia. I found that the deeds to the Ollie, Winnemucca and Reno claims were held in escrow for $21,500.00 and that Gallagher was trustee. We paid $75.00 attorney's fees to get the papers out; then we had to get a deed from Gallagher. When the $25,000 was received, all the liabilities of the company were found out, and this mortgage was found unsatisfied, and the secretary reported the status, and we took his word for it. I think the fee was $1,000.00. I was attorney at first, but before that other came up I think I turned over the matter to Mr. Smith. I was always fair and square.

Redirect Examination by Mr. SHANK.

I was opposed to the French contract—I mean the contract with Locker—because of the amount the company must put up, the fact that they must sustain offices over in France for three years, submission to the French law, and the agent put in charge over there.

Cross-examination by Mr. EDWARDS.

I think we had to give bond in France, appoint an agent and so on. I [135] objected inasmuch as we did not know enough about French law to be safe in attempting to read or interpret it.

Redirect Examination by Mr. SHANK.

No, I thought that an American company operat-

(Testimony of Charles S. Varian.)

ing in France ought to be in a position to be advised by lawyers who were acquainted with French law. I know nothing about French certificates.

Cross-examination by Mr. EDWARDS.

I do not remember having had submitted to me any stock certificates of any kind. In fact, the board never tried to raise money to transact its business except through the contracts made by the board with Locker and with McCornick Brothers.

Redirect Examination by Mr. SHANK.

I do not know as we tried to borrow money upon the credit of the corporation. We all knew that our only source of revenue was the sale of capital stock.

Cross-examination by Mr. EDWARDS.

After the mortgage was paid off, we never tried to raise money.

(Adjournment to February 23, 1912, 10 A. M.)

Friday, February 23, 1912, 10 A. M.

[Testimony of Lester D. Freed, for Plaintiff.]

LESTER D. FREED, witness for complainant, testified:

My name is Lester D. Freed. I reside in Salt Lake City, Utah, and have for twenty-two years. I am in the furniture business. I was formerly a member of the board of directors of the Tenabo Mining & Smelting Co. I guess I was an incorporator. I was never any other officer. I faintly remember the contract submitted the company for sale of stock in France by Mr. P. B. Locker. I think he presented it himself. Janney did not have anything to

(Testimony of Lester D. Freed.)

do with it that I know of then. I think there was paid to me something like $550 for being a member of the board. I never saw the properties of the company.

Cross-examination by Mr. EDWARDS.

I do remember that the capital stock of the corporation was paid for by deeding to it the mining properties of the Gem Consolidated and the Tenabo Consolidated Mining & Smelting Co., which companies were controlled [136] respectively by Locker and Tyree. I have never gotten the stock and don't know how it was paid for or anything about it. I was to get the 100 shares for being on the board of directors. The Trust Company in New York never sent me a certificate for my stock. I never transferred any stock. We all resigned together, at the same time. They were accepted and others put in. Yes, Locker presented a contract to the board shortly after I handed my resignation in, but it was turned down. We had many meetings, and I used my own judgment and was not influenced by anyone. I am willing to abide by the minutes.

Redirect Examination by Mr. SHANK.

I think Mr. H. P. Clark requested me to become an incorporator of this company. I am connected with him in different enterprises. I had no personal investment in the corporation excepting the stock I was entitled to. I have mentioned the fact that I wanted my stock at directors' meetings, but did not receive it.

Cross-examination by Mr. EDWARDS.

I became a member of the board of directors on

(Testimony of Lester D. Freed.)

account of my close relations with Mr. Clark and my desire to accommodate him. I have not visited the properties but have investigated the merits of them. I perused Ex. 2 carefully. I knew Mr. McVichie at that time and knew his standing as a mining engineer. I also knew Wm. Spry, Llew Humphreys, Frank Knox, Heber M. Wells, J. E. Frick, M. H. Walker, W. S. McCornick, David Keith, and knew that they all stood high in the community, etc.

Cross-examination by Mr. EDWARDS.

I resigned because I did not like the way the entire proposition was being handled. I was spending more time than I could afford on the board.

Redirect Examination by Mr. SHANK.

No, I did not like the way things were handled. I have reference to Locker and Janney and Tyree and possibly W. S. McCornick. I understood that Tyree had some connection with another company which this company absorbed. I thought the contract Locker and Janney were trying to get from the company was in pursuance of some scheme between them. Locker was supposed to have the stock in charge and the sale of it. **[137]**

Cross-examination by Mr. EDWARDS.

I simply knew there was a friction between Tyree, Locker and Janney and that one or the other was constantly trying to get a contract from the board, leaving out the other party. I understand that the Tenabo Mining & Smelting Co. took over the other two corporations in stock and consolidated them.

(Testimony of Lester D. Freed.)

Locker simply handled the contracts through the board and that is the only way he controlled the stock. He had nothing else to do with the running of the company. There were some transactions Mr. Tyree tried to get through by means of McCornick & Co. It was that they requested the board to trade in its stock upon the New York curb. Also, Mr. Tyree owed Mr. McCornick considerable money and Tyree made a sale of 1,000 or more shares and we would not pass on it, for we thought we had such a large mortgage and could not do it.

(Witness excused.)

Complainant's Exhibit No. 2 [Division of Stock].

HOTEL IMPERIAL.

Hotel Imperial.

Broadway 31st and 32d Streets, New York.
Copeland Townsend, Manager.

Robert Stafford, Proprietor.
Cable address: "Imperial"
Telephone 6100 Madison.

New York, June 25th—08.

Memorandum of Agreement of Division of Stock. To form a Consolidated Company of 1,500,000 shares of which 500,000 shares to be treasury stock. Highland to have 500,000 shares of stock at 25¢ a share—300,000 shares treasury stock and 200,000 shares outstanding stock. This leaves 800,000 shares of outstanding stock to be distributed as follows:

400,000 shares to go to pay for Little Gem properties.

300,000 shares to go to pay for Tenabo Consolidated properties.

100,000 shares remaining and also the proceeds

from the sale of 200,000 shares of outstanding stock to Highland is to be equally divided between Tyree, one half, and Locker & Janney, one half.

H. TYREE.
JOHN JANNEY.

[Endorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. Mem. of Division of Stock. Complainant's Exhibit No. 2. Filed Septr. 5th, 1912. T. J. Edwards, Clerk. [138]

Complainant's Exhibit No. 4 [Letter, April 15, 1909, P. B. Locker to R. T. Badger].

THE STRATFORD HOTEL CO.
Michigan and Jackson Boulevards.
Chicago.

April 15th, '09.

Mr. R. T. Badger, Treas.,
Tenabo Mining & Smelting Co.,
Utah National Bank,
Salt Lake City, Utah.

Dear Sir:—

Attached hereto is a copy of the letter that I have this day addressed to The Windsor Trust Co., of New York City. A copy of the application and receipt given is also hereto attached.

The price at which the stock is sold is 75¢ per share. The amount of money remitted is $1,425.00, all in the form of certified checks. Of this amount, $285.00 is the company's net, and that due me is $1140.00.

Another remittance will be sent in this week which

should amount to considerable more than that sent today.

Very truly yours,
P. B. LOCKER.

April 14th, '09.

Windsor Trust Co.,
32 Nassau St.,
New York City, N. Y.

Gentlemen:—

Enclosed you will please find applications for stock in the Tenabo Mining & Smelting Co., with certified checks in settlement therefor as follows:

Name.	No. of Shares.	Amount.
Chas. C. Williams.	500	$375.00
R. C. Wilson.	500	375.00
Raymond Reed Phelps.	500	375.00
L. H. Reinking.	300	225.00
Edward R. Newcomb.	100	75.00
	Total, 1900	Total, $1425.00

You will please issue certificates in accordance with application, and deposit cash to the credit of The Tenabo Mining & Smelting Co.

Very truly yours.

APPLICATION.

——— Shares. No. 1.

TENABO MINING AND SMELTING COMPANY.

Capital stock 1,500,000 shares. Par Value $2.00 each. Treasury Stock 750,000 shares. Fully paid and non-assessable. Mines at Tenabo, Lander Co.,

Nevada. I hereby apply for ——— Shares of the Capital Stock of the Tenabo Mining and Smelting Company, at the price of seventy-five (75) cents per share, for which I hereto attach current exchange for ——— dollars, payable to the Tenabo Mining and Smelting Company, for which I hold receipt No. 1, in consideration of the price at which this stock is purchased, I hereby agree that the certificate for said stock shall be held by the Windsor Trust Company until November 15th, 1909, and then mailed to ———. Signature ———. Address ———.

———— 19——

Issued Receipt No. 1.

To ——— Address ——— Certified Check ——— dollars.

Shares ——— $——— for New York Draft.

————, Agent. **[139]**

——— Shares. No. 1.

RECEIPT PENDING ISSUANCE OF CERTIFICATE.

TENABO MINING AND SMELTING COMPANY.

Fully paid and non-assessable.

Capital stock 1,500,000 shares. Par value $2.00 each. Treasury stock, 750,000 shares. Mines at Tenabo, Lander Co., Nevada.

Received of ——— ———— 190—— of ——— current exchange for ——— dollars, payable to the Tenabo Mining and Smelting Company for deposit to the account of said company with the Windsor Trust Company of New York, depositary, being payment in full for ——— shares of the Capital Stock

of said Tenabo Mining and Smelting Company at seventy-five (75c) cents per share, as per application No. 1. Certificate for said stock to be held by the said Windsor Trust Company until November 15th, 1909, and then delivered by mail as per application. Tenabo Mining and Smelting Company. By ———. Form W. A.

[Endorsed]: No. 1173. U. S. District Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. Report of Treasurer. Complainant's Exhibit No. 4. Filed September 6, 1912. T. J. Edwards, Clerk.

Complainant's Exhibit No. 7 [Obligation of Gem Con. Mining Co. and Tenabo Con. M. Co.].

In consideration of one dollar, and having issued our joint and several note in the sum of Five Thousand ($5000) Dollars unto the First National Bank of Hornell, N. Y., or its agents, the right at any time upon default in the payment of the said note to enter upon any and all of the property of the undersigned and to extract therefrom ores sufficient to fully discharge all indebtedness, and we hereby bind ourselves and assigns to fully discharge this obligation.

GEM CONSOLIDATED MINING CO.
HIRAM TYREE,
Pres't.

TENABO CONSOLIDATED MINES CO.
P. B. LOCKER,
Pres't.

July 17, 1908.

Filed May 27, 1911, at 3:05 P. M. Recorded at request of C. Adsit 5/29/11 at 3:35 P. M. Bert Acree, County Recorder. File No. 2004.

State of Nevada,
County of Lander,—ss.

I, Bert Acree, County Recorder in and for the said County and State, do hereby certify that the foregoing is a full and correct copy of an instrument given to the First National Bank of Hornell, N. Y., permission to enter upon the property of the Gem Consolidated Mining Co., and the Tenabo Consolidated Mines Co., for the purpose of extracting ore, etc., as the same appears of record on page 712 of Book 4 of Miscellaneous Records of Lander County, State of Nevada, in my office as said Recorder.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 9th day of June, 1911.

[Seal] BERT ACREE,
County Recorder in and for the County of Lander, State of Nevada.

[Indorsed]: No. 1183. U. S. District Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. Obligation of Gem Con. M. Co., and Tenabo Con. M. Co. Complainant's Exhibit No. 7. Filed September 6, 1912. T. J. Edwards, Clerk.

Complainant's Exhibit No. 9 [Report and Statement of Tenabo Mining & Smelting Co. to Attorney General of Nevada, etc.].

Report and Statement of the Tenabo Mining & Smelting Company, 105–106 Mercantile Block, Salt Lake City.

May 31, 1911.

To the Attorney General of Nevada and to the County Recorder of Lander County, State of Nevada.

Pursuant to law, the Tenabo Mining & Smelting Company hereby makes and files its statement containing the following facts and information: This company owns the following claims, namely: The Little Gem and the Widow's Lode, which are patented, the Ollie, Reno, Winnemucca, Widow's Extension, Copper Hill No. 1. Copper Hill No. 2, Copper Hill No. 3, Copper Hill No. 4, and the Reliance Nos. 1, 2, 3 and 4, unpatented claims.

These claims, with the exception of the Copper Hill group, are located in the Bullion Mining District, Lander County, Nevada, the nearest postoffice being Tenabo, Nevada, about one and one-half miles distant; the [140] Copper Hills Group is located across the valley fourteen miles to the east and in the Cortez district, the nearest postoffice being at Cortez, Nevada.

The company holds undisputed title to the above claim under the patent and location laws of the United States under quitclaim deeds, dated January, 1909, and duly recorded in the office of the County Recorder in which the claims are located. There is a $1,500 mortgage on the property.

The surface improvements and machinery consist of a 15 H. P. gasoline hoisting engine, a 20 H. P. gasoline engine to drive belt-driven air compressor, capacity 200 cubic feet of air per minute, gallows frame, whim, carpenter and blacksmith shops, boarding-house and bunk-house sufficient to accommodate twenty-five men. Total value about $10,000. This equipment is located on the patented property.

Total feet of development in the Gem mine con-

sists of 400 feet of incline shaft 715 feet of drifting, blocking out 28,880 tons of ore of a value of $479,907.90, according to the report of Mr. Duncan McVichie.

On Widow's group are a series of shafts and small workings varying from a few feet to over 100 feet in depth, showing five parallel ledges.

The Copper Hill group has 120 feet of tunneling and 14 feet of cross-cutting, not sufficient to show the limits of the ore bodies. All work except first 20 feet of tunnel is in ore. Surface conditions indicate the ore bodies to be 300 feet in width.

The character of the development work done since last report, according to the statement of the superintendent, is as follows: Extending tunnel on Copper Hill No. 3, 45 feet; cur and tunnel on Ollie claim, 35 feet; on the Reno, cut 20 feet, shaft 12 feet; on the Winnemucca cuts and tunnels, 40 feet; on the Widow's Extension, shaft, 15 feet; on the Reliance, Nos. 1, 2, 3, cuts and tunnels 70 feet.

The authorized capital stock is 1,500,000 shares, par value $2 each of which 750,000 shares were originally placed in the *treasure*. Shares remaining unsold, 582,750. No treasury stock has been sold during the last six months and no ore or bullion has been shipped.

Receipts and Disbursements:

Balance in Utah National Bank, November 30, 1910	$ 56.68
Bills payable	1,500.00
Cash Deposit	1.25
Total	$ 1,557.93

Disbursements:

Assessment work	$1,100.00
Location work	28.00
Accounts payable	50.00
Sec. Sal. (4 month's office ex.)	200.00
Legal	20.00
Telegrams	18.46
Printing and postage	33.25
General expense	10.30
Balance in Bank	97.92
	$ 1,557.93

Very respectfully,
(Signed) TENABO MINING & SMELTING COMPANY,
W. MONT. FERRY, President.
JOHN JANNEY, Secretary.

State of Utah,
County of Salt Lake,—ss.

This day personally appeared before me, Benner X. Smith, a Notary Public, in and for the State and County aforesaid, W. Mont. Ferry and John Janney, who being first duly sworn, stated upon oath that they are respectively the President and Secretary of the Tenabo Mining & Smelting Company, a Nevada corporation; that they have read the foregoing statements; that they know the contents thereof and that the same are true and correct to the best of their knowledge and belief.

(Signed) W. MONT. FERRY,
JOHN JANNEY.

Subscribed and sworn to before me this 30th day of June, A. D. 1911.

[Seal] (Signed) BENNER X. SMITH,
Notary Public. **[141]**

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. Defts'. Report to Atty. General. May 31, 1911. Complainant's Exhibit No. 9. Filed September 6, 1912. T. J. Edwards, Clerk.

Complainant's Exhibit No. 10 [By-laws of Tenabo Mining & Smelting Co.].

BY-LAWS.

I. Corporate seal.—The seal of this corporation shall be as follows: It shall contain the name of the corporation and the statement that it was incorporated on December 31st, 1908.

II. Stockholders' Meetings.—The annual, and all special meetings of the stockholders, until otherwise provided, by resolution of the Board of Directors, shall be held at the principal office of the company at Salt Lake City, County of Salt Lake, State of Utah, and the annual meetings of said stockholders shall be held on the second Monday in February of each year at two o'clock in the afternoon of said day, and the notice of the holding of any meeting of the stockholders either annual or special shall be given by the president or secretary to each of the stockholders of this company of record, at least twenty days next prior to the date of the holding of such meeting, by the mailing to each of said stockholders a written

notice of the time and place of the holding of such meeting, and in general terms the business to be transacted thereat, addressed to the last known address of each of said stockholders respectively.

The annual and special meetings of the stockholders may be held at such place or places either within or without the State of Nevada as may be determined upon by the Board of Directors, and at all meetings of said stockholders a majority of the stock issued and outstanding shall constitute a quorum to transact business, and a majority vote of all stock represented at any such meeting shall be decisive of all questions voted upon.

III. Directors.—The Directors of this corporation shall be elected at the annual stockholders meetings, by ballot, but in event of the failure to hold such annual stockholders' meetings, then said Directors may be elected at a special meeting of the stockholders called for that purpose. The term of office of Directors elected at an annual stockholders' meeting shall be for a period of one year, and until their successors are duly elected and qualified; but the term of office of any director elected at a special meeting of the stockholders shall be for the unexpired term of the official year and until their respective successors are elected and qualified. The directors elected at the first meeting of the incorporators shall hold office for two years from date thereof and until their successors are chosen and qualified. To be qualified to hold the office of Directors a party must be the owner of at least one hundred shares of the capital stock of this company as shown by the books thereof.

IV. Directors Meetings.—Meetings of the Board of Directors may be called by the President or Secretary, or any two directors, upon the mailing to each of the directors at their last known place of address, at least two days before the holding thereof, a written notice of the time and place of holding such meeting, together with a statement in general terms of the business to be transacted at said meeting, and any meeting of the Board of Directors may be held in the city of Salt Lake, County of Salt Lake and State of Utah, or at any other place either within or without the State of Nevada that may be determined upon by the Board of Directors.

V. Officers.—The officers of this corporation shall be a president, a vice-president, a secretary, a treasurer and a general manager, who shall be elected annually and in all cases hold their respective offices until their successors are chosen and qualified.

VI. Qualification of Officers.—The officers of this corporation shall be elected by and from the Board of Directors, except the general manager and secretary, neither of whom need be directors of said corporation nor stockholders therein.

VII. Duties of President.—The president, and in his absence, the vice-president, shall preside at all meetings of the company and of the Board of Directors, and perform with such other duties as may be assigned to him by the Board of Directors.

VIII. Duties of Vice-President.—The vice-president in the absence of [142] the president, perform all duties of the president. He shall perform such other duties as may be from time to time pre-

scribed by the Board of Directors.

IX. Duties of Secretary.—The secretary shall have charge of the seal; he shall keep the records and books of account of the Company, and perform such other duties as may be assigned to him by the Board of Directors.

X. Duties of Treasurer.—The treasurer shall have charge of the funds of the company, subject to the Board of Directors, and shall give bond in such sum and with such surety as the Directors shall prescribe.

XI. Duties of General Manager.—There shall be a general manager who shall be elected by the Board of Directors, and who shall have general supervision of the business affairs of this company, subject to the Board of Directors.

XII. Authority to Certify Copies of Records.—The secretary shall have authority to certify the copies of by-laws, copies of resolution of the Board of Directors and copies of other papers and official documents constituting a part of the records of the company.

XIII. Authority to Execute Contract.—Unless otherwise provided by special resolution or power of attorney, all contracts, powers of attorney, deeds, agreements, applications, instruments in writing and all legal documents made and entered into by this company shall be executed by the President and the Secretary, who are authorized to affix the corporate seal of this company thereto. In the absence of the president, the vice-president may execute said instrument in his stead, and in the absence of the secretary,

the Treasurer may execute such instrument as acting secretary.

XIV. Quorum.—Three members of the Board of Directors shall constitute a quorum of the Board of Directors for the transaction of business.

XV. Authority of Vice-President and Acting Secretary.—In the absence of the president, the vice-president may in all respects perform and carry out the authority of the president, and in the absence of the secretary, the treasurer or assistant secretary shall act as secretary.

I, John Janney, Secretary of the Tenabo Mining and Smelting Company, hereby certify that the foregoing is a true and exact copy of all of the by-laws of the said company and that the same are regularly entered of record in the minute-books of the said company.

In testimony whereof, I hereunto affix my signature and the corporate seal of the said Tenabo Mining and Smelting Company, this —— day of March, 1910.

_____,

Secretary.

United States of America,
State of Utah, County of Salt Lake,—ss.

This day personally appeared before me, ————, a Notary Public in and for the State and County aforesaid, John Janney, who, being first duly sworn, did dispose and say that he is the Secretary of the Tenabo Mining & Smelting Company and as such is duly authorized to certify to copies of the records of the said company and that the foregoing is a true and

correct copy of all of the by-laws of the said company and that the same are regularly entered of record in the minute-books of the said company.

Subscribed and sworn to before me this —— day of ————, 1910.

————————————,
Notary Public.

My commission expires ———.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. By-laws. Complt's. Exhibit No. 10. Filed September 7, 1912. T. J. Edwards, Clerk.

Complainant's Exhibit No. 11 [Letter, Dated May, 1911, P. Pon Banque Chareire & Cie to John Janney].

BANQUE CHAREIRE & CIE,
Societe en Commandite.
Au Capital De 1,000,000 De Francs.
Agency De Paris,
7, Rue Drouot.

Address Telegraphique,
Charebank-Bourse-Paris.
Telephone (313.28
(326.66 [143]

Paris, May, 1911.

Mr. John Janney:

We have the honor to convey to you under this cover a notice relative to the emission in France of 45,000 certificates of $20 each of the Tenabo Mining and Smelting Company at the price of 103 francs and 60 centimes. We pray you to read attentively

this notice, which will give you an idea of the brilliant results obtained up to date by the metallurgical enterprises or methods in mining of the same region.

From the advice of the most competent engineers, the Tenabo Mining and Smelting Company constitutes an enterprise similar to and of the first order. Its richness in gold, silver and copper actually visible, represents already a value of 20,000,000 of francs, or thereabouts. They estimate at more than 32 per cent the annual dividends from the start.

Payment will be demanded by the Society (that is, cash shall accompany the order). We therefore believe, that we can recommend the immediate purchase of the shares at par, at 103 francs and 60 centimes, by certificate of $20 each, for it is to be presumed that an immediate raise will take place at the time, or immediately upon, their introduction in the market.

The Franco-American Bank, 22 Place Vendome, at Paris, is charged with the service of the coupons in these transactions, and is equally agent responsible to the Society, opposite the Administration of Registration and seal.

We send with this document a bulletin of purchase, which please return with the mention of the number of shares which you desire to have reserved, and which we will discount for the account of the Society, with the conditions as above until after the transaction is completed.

Please, my dear sir, accept our distinguished salutations.

P. PON BANQUE CHAREIRE & CIE.

P. FRICART.

TO MAKE MONEY.

Many Fortunes—the best known in the entire world—have been made in mining affairs by purchases at the opportune moment or time. Before you interest yourself in a mine learn well and inform yourself regarding the personalities who direct the mine. If this double examination does not give you absolute conviction: 1st, that the mining question possesses in re*alty* all of the desirable qualities in order to be assured of a remunerative future; 2nd, that it is administered by competent persons and of perfect honor, giving you all the possible guarantees in point of view of the security of the operation that you are about to enter into—ABSTAIN YOURSELF.

But if, on the contrary, the information which has been given to you upon an affair of mining is of a nature that will satisfy you entirely upon the subject, so that it will be administered to your profit, then DO NOT HESITATE TO TAKE AN IMMEDIATE PARTICIPATION in the affair which is proposed to you, for it is the moment when you are solicited regarding the same that you have the more chances to make a very PROFITABLE OPERATION. IT WILL BE TOO LATE WHEN EVERYBODY WILL KNOW THAT THERE IS MONEY TO BE MADE ON THIS SIDE, and the shares which you hesitate to buy at the moment of their *apparation* will have run the most interesting period of enhancing in value.

This follows very rapidly the law of offer and demand, and if you wait until the results foreseen be-

gin to be realized, you will lose the greatest chance to become a beneficiary, and it will cost you a great deal more, because the value of the shares will enhance.

THIS IS AN OCCASION to make good the recommendations given above. READ ATTENTIVELY the notice CONCERNING THE TENABO MINING AND SMELTING COMPANY, and you will be convinced of finding unity in the entire affair—all of the proper elements to assure you an ENORMOUS GAIN, SURE AND RAPID. IT WILL BE one of the most brilliant transactions of the century. You cannot have any doubt regarding that. Because the properties of this Society are situated in the most mineralized part of the State of Nevada. The LANDER COUNTY which occupies a third place in the total production of gold and silver in the UNITED STATES. Three of the mines in the immediate vicinity of TENABO have already produced more than ONE HUNDRED *DOLLIONS* OF FRANCS. [144]

Because this company possesses four mines already recognized and developed, and the diversity of the metals extracted from the mineral which is found in abundance (or silver and copper) assure them of permanency, and of a long and profitable exploitation.

The mineral in sight actually represents a value of 19,026,382 francs, which corresponds already to 20 francs per share (that is to say, 200 francs per certificate).

Because the bank in which you have confidence

has studied this affair, and the calculations it has made will prove without doubt what a BRILLIANT FUTURE is reserved for this affair. The construction of a FOUNDRY will permit not only the economical treatment of the mineral upon the place where it is located, but more, to his great profit. The exploitation of mines in the vicinity will augment considerably the future payment of dividends. The importance of TENABO is based upon ores already known to be, not only by the mining enterprises which will bring mineral to the foundry, but also two powerful Railroad Companies: The Western Pacific Railroad and the Southern Pacific Railroad, which have decided of themselves as to freight charges. From the viewpoint of a financier, the unity of interest of the beneficiaries would be perfect between all of the shareholders. There are no privileged actions, nor obligations.

Because the administrators of the Society are personally large shareholders, and their situation does not permit them to associate their names with an enterprise upon any feature of which they would have the least doubt.

Because some of the most powerful banks in Western America gave them their support, and the emission of shares issued to the French shareholders is in the hands of a rich and powerful syndicate, which without doubt will give it greatest care.

Now DO NOT WAIT until the effects are felt. THIS IS THE MOMENT for you to reassure yourselves of the veritable coup de fortune. You will regret later on of having let the occasion escape.

The subscription will be without doubt several times covered. MAKE HASTE therefore, and take a chance, small or great according to your means, to profit at the prices now offered; and to assure yourself, address your orders IMMEDIATELY to your bank, or it will not be able to attend to all demands, and will be unable to serve you as you would like.

TRY TO BE AMONG THE FIRST.

BANQUE CHAREIRE & CO.

7 Rue Drouot, Paris.

Please buy on my account certificates of Twenty Dollars of the Tenabo Mining and Smelting Company at par, at the price of one hundred and three francs and sixty centimes (103 fr. 60 centimes), payable in cash. I remit you enclosed a sum representing the amount of this order. Please remit to me the titles against the reimbursement.

Signature: ————————————.

Name ————————

Address ————————

(1) Number of certificates demanded.

(2) Mode of payment not chosen.

(3) In case of change of address please indicate in returning this bulletin.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. French Documents. Complainant's Exhibit No. 11. Filed September 7, 1912. T. J. Edwards, Clerk. **[145]**

Complainant's Exhibit No. 12 [List of Certificate Stubs of Tenabo Mining & Smelting Co.].

List of Certificates Stubs that are Blank.

Book "A." 110 to 129, inclusive.
131 to 152, "
154 to 156, "
158 to 168, "
170 to 204, "
206 to 208, "
Book "D." 1039 to 1200, inclusive.
Book "E." 1457 to 1460, "
1462 to 1500, "
Book "F." 1502 to 1750, "
Book "G." 1957 to 1960, "
Book "H." 2002 to 2021, "
2023 to 2032, "
2034 to 2036, "
2043 to 2141, "
2143 to 2193, "
2197 to 2198, "
2200 to 2241, "
Book "I." 2252 to 2450, "
2452 to 2500, "
Book "J." 2502 to 2594, "
2596 to 2674, "
2676 to 2679, "
2682 to 2691, "
2693 to 2694, "
2696 to 2699, "
Book "L." 3213 to 3220, "
3222 to 3250, "

Book "M." 3252 to 3410, "
3436 to 3494, "
3496 to 3500, "
Book "P." 4096 to 4147, "
4149 to 4171, "
4173 to 4196, "
4197 to 4221, "
4232 to 4250, "
Book "Q." 4252 to 4320, "

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Bates vs. Tenabo M. & S. Co. List Certificate Stubs Complainant's Exhibit No. 12. Filed Septr. 7, 1912. T. J. Edwards, Clerk. [146]

[Testimony of H. P. Clark, for Plaintiff.]

H. P. CLARK, witness for complainant, upon oath testified:

My name is H. P. Clark. I reside in Salt Lake City. I am in the banking business, and have been 18 or 20 years. I have lived in Salt Lake eight years and seven months. I am a stockholder in the Tenabo Mining & Smelting Co. I own 100 shares, I believe. I never received the stock, however. I became stockholder at the time they incorporated. I never invested any money in it but was on the board of directors. I was president until February, 1910. I have never seen the properties of defendant. Mr. Janney requested me to go on the board. I terminated my relations with the company on my own account. I was not satisfied with some things. I did not like Hiram Tyree and did not want to have anything to do with him. He was trying to get in

(Testimony of H. P. Clark.)

and run the company. I was confident of Janney and Locker.

Cross-examination by Mr. EDWARDS.

I always acted in the company's interests. I never transferred any shares of stock because I never had any.

(Witness excused.)

[Testimony of Benner X. Smith, for Plaintiff.]

BENNER X. SMITH, witness for complainant, testified:

(Produces contract marked Ex. 7.) That contract was received by me right after I qualified and at the time negotiations were taken up with Mr. Locker for the sale of stock. Mr. Janney sent it to me together with the Coudert letter and form of trust agreement heretofore offered in evidence. (Exhibit 7 copied in words and figures:)

Printed
Republique
2/mes
10
Ensus
1F 50 c.
Francaise

(Impression seal)
Enregistrement
Timbre et Domaines.

Between the undersigned:

"The Tenabo Mining & Smelting Company" registered with a capital of Three Million Dollars, the head office of which is at Salt Lake City (represented herewith by Mr. Payton B. Locker, fiscal agent of the said company, acting under powers vested in him by the extraordinary General Meeting of the company held on the 14th January, 1909) hereafter called the Vendors, of the one part, and Messrs. J. A. C. Courtot & Co., Bankers, 51 Rue le Peletier,

Paris, of the other part, It has been arranged and agreed as follows:

"The Tenabo Mining & Smelting Company" being desirous of placing 450,000 shares of its capital stock in Europe, of a nominal value of two dollars each, and the J. A. C. Courtot & Co.'s bank, after having examined the papers of the said company, and the reports of the engineers, agree to lend their support, and the following arrangements have been made between [147] the parties:

Article 1. (a) The Vendor agrees to apply through Messrs. J. A. C. Courtot's bank to the Minister of Finances and to the Administration for the Registration of Property and Stamp in Paris for the compound duty on the shares and to furnish all necessary documents required by the laws of the French Republic (and to furnish the amount of caution money for the said shares or part thereof).

(b) They further agree to supply all documents necessary for the publication prescribed by the laws of the official Journal of the French Republic.

(c) They furthermore agree to abide by the formalities required for obtaining the admission of the shares upon the French market.

Messrs. J. A. C. Courtot's bank, on the other hand, bind themselves to give all their assistance in respect to these various formalities so that they may be accomplished in the shortest possible time.

Article 2. The cost in respect to application for compound duty on the shares and for deposit in respect of annual taxes to the Administration of the

Registration of Property and Stamp as also the compound duty or *comptant* stamping, and further the costs of publication in the official Journal for obtaining the free circulation of the said shares in France, together with the expenses attached to the quotation of the shares and cost of printing the same to Bearer, as also all cost of advertising in the daily press of Paris and the Providences, or in other financial papers, and generally the cost of issuing, are altogether reckoned to amount to a minimum sum of 45,000 dollars. (This amount shall be supplied by the Vendor.)

(Written in longhand:) x 14 words ruled out and replaced by the following phrase: in three payments of one-third of $45,000, for each of the three options mentioned in art. 3 hereafter) and in the event of expenses exceeding that amount, then J. A. C. Courtot's bank shall bear all sums in excess of that amount.)

Article 3. The Vendor hereby give option for three months to Messrs. J. A. C. Courtot's bank at a price of Frs. 6.25 per share of nominal value of two dollars each, for 150,000 shares dating from the signature of these presents, after all necessary documents have been handed over to commence placing. J. A. C. Courtot's bank takes firm one-half of the said 150,000 shares, being therefore 75,000 shares, which they bind themselves to pay for within three months from the date of the above mentioned documents being handed over to them by the Vendor.

The Vendor bind themselves to pay to J. A. C. Courtot's bank the *pro rata* proportion of the said

$45,000 mentioned in Article 2 above, being therefore the sum of $15,000, upon the documents being handed over to J. A. C. Courtot's bank at first request.

In the event of J. A. C. Courtot's bank having, at the expiry of three months placed and paid for the whole of the 150,000 shares, then the bank shall have the right to a further block of 150,000 shares under the same terms and firm taking, as above mentioned, except that the time option shall be six months instead of three months, by reason of the summer season. And if at the end of the said six months J. A. C. Courtot's bank have placed the second block of 150,000 shares, then the bank shall have the right to placing under the same terms, conditions and firm taking, as aforementioned, of a third block of 150,000 shares, being the remainder of the 450,000 shares hereinbefore mentioned.

Article 4. The shares shall be delivered by a trustee and shall represent nominative certificates deposited by the company in the hands of the said trustee. The shares so delivered shall be to bearer under the seal of the company with coupons attached and conjointly signed by the directors of the company and the trustee; the said 150,000 shares to be first delivered shall be in the following denominations:

20,000 certificates to Bearer of five shares each.

5,000 certificates to Bearer of ten shares each, and this shall also apply to further blocks of shares so far as same has not been altered. If required by

mutual consent of the parties. A specimen of the shares shall be supplied by J. A. C. Courtot's bank. [148]

Article 5. J. A. C. Courtot's bank bind themselves to obtain as soon as possible a quotation of the said shares on the French Bank market. Nevertheless the sale of the shares by J. A. C. Courtot's bank may commence before the necessary formalities in respect of said quotation have been fulfilled.

Article 6. The Vendors, on the other side, bind themselves to have the shares quoted on the New York Stock Exchange, but so that the prices under such quotations in New York shall not be less than those in Paris.

Article 7. The trust certificates to Bearer shall be lodged by the Vendors in a Parisian Bank, which shall hold the same at the disposal of J. A. C. Courtot's bank against payment.

Article 8. The Vendors guarantee not to issue certificates to Bearer for a larger quantity *that* that of 450,000 shares above mentioned, but as the Vendors shall still hold a further 300,000 capital shares for disposal, they give by these presents to J. A. C. Courtot's bank a preference right thereto if they decide at any time to place the same, being the said 300,000 shares, or part thereof, in Europe.

Article 9. The Vendors bind themselves to have an office of the company in J. A. C. Courtot's bank establishment for giving information and shall pay an annual rent of frs. 5,000 on condition that J. A. C. Courtot's bank shall hold the said office properly

(Testimony of Benner X. Smith.)

furnished, heated, lighted and shall nominate one English speaking clerk to attend especially to the business of the Tenabo Mining & Smelting Company.

Article 10. It is hereby agreed that the dividend coupons shall be payable in Paris without any deduction for commission or discount except legal taxes, and J. A. C. Courtot's bank is hereby appointed as financial agent for the payment of the said dividends, and shall be allowed a commission of frs. 5 per frs. 1,000 paid in coupons to the company.

If, however, J. A. C. Courtot's bank deem it necessary to transfer the payment of the coupons to another bank, then they shall give the latter the said frs. 5 in respect of each frs. 1,000 paid in dividends.

All disputes arising under these presents shall be referred to the Tribune of Commerce of La Seine, which is hereby declared to be alone competent to deal with same.

Made in duplicate in French and English in Paris, this 15th day of December, 1909.

La et approuve
Joll * * *

Cross-examination by Mr. EDWARDS.

We took it up for consideration, and discussed the advisability of entering into it, and finally drew up another which eliminated the bad features. The expenses—registration fees, advertising expenses, an office rental, etc. I did not like the submission to the courts of France a little bit. But I did not see how the stock could be sold in this country. I made no special investigation, however. I was told that

(Testimony of Benner X. Smith.)

the curb quotations in New York were founded on wash sales and did not represent anything. The price of the curb quotations was $2.00 a share. I think. They were carried on by Tyree. I saw a clipping in a New York paper to that effect. [149]

Redirect Examination by Mr. SHANK.

None of the company's stock was sold on the curb. I heard that about $12,000 worth of stock had been sold on the curb. I do not know to whom. In the Locker contract, Mr. Locker was authorized to sell stock so as to net the company fifty cents a share. I don't know how much he was going to sell it for on the market. I thought fifty cents to the company was ample, and that if he could get 150 per cent, he could have it as he was to a big expense over in Paris.

[Testimony of W. Mont Ferry, for Plaintiff.]

W. MONT FERRY, witness for complainant, testified:

Direct Examination.

I have not found the certificates of stock issued to me.

[Testimony of Rodney T. Badger, for Plaintiff.]

RODNEY T. BADGER, witness for complainant, testified:

My name is Rodney T. Badger. I reside in Salt Lake City. I am cashier of the Utah National Bank, and have been for four years. I have lived in this city thirty-nine years. Prior to becoming cashier, I was assistant cashier of McCornick & Co., bankers. I was with them eighteen years. I was stockholder

(Testimony of Rodney T. Badger.)

in the Tenabo Mining & Smelting Co., until about a year and a half ago. I was an incorporator and was on the board of directors, and secretary and treasurer. Mr. Tyree requested me to be on the board. One of his companies went into this company—the Gem property. I think the company transferred a certain number of shares to the Gem Mining Company, but I don't remember how many. I never had financial dealings with the company. The account with us was closed May 22, 1911. I delivered all books and papers of the company to Mr. Janney when I went out of office. Also all checks. I have the original ledger sheet as run on the books of the bank. (Produces ledger sheet, marked Exhibit 8.) That is absolutely true. I think the first deposit of $1,425 was perhaps derived from the sale of stock by Mr. Locker. The deposit of $24,551.40 was, I think, a wire credit from some New York Bank.

I resigned because we had several words, scraps concerning Mr. Tyree and Mr. Locker, and I didn't want to stay longer. I closed my association because I did not want to do lots of things they wanted us to do—Locker and [150] Tyree, also Janney, who seemed to side in with Locker. I don't know how much stock was delivered for the $24,551.40. I did not know Tyree got a ten thousand dollars out of that sale. I did not know Tyree kept about 65,000 shares of stock which the company delivered up. I did not know Tyree executed the company's note for any amount or that he hypothecated some stock as security for other notes. The stock was in the hands of

(Testimony of Rodney T. Badger.)

the Trust Co. in New York, and they would have reported it to the company here. I knew the Reliance Co., owed McCornick & Co., when I left them—February, 1908. I don't know how much. I remember there was a payment on that note and mortgage. Don't remember when.

Cross-examination by Mr. EDWARDS.

I remember that the corporation took over the title to certain mining claims belonging to the Gem Consolidated Mining & Milling Co., in payment of its capital stock. The stock was given to me—one hundred shares—for being a director. I have never received a certificate nor assigned the stock to anyone. The New York office never issued the stock. I kept up all accounts so that they could be worked up in a short time. All assets, expenditures, etc., were kept separately.

The board were always in harmony. It was Tyree and Locker that made the scraps. Tyree never came to meetings after the time we had the scrap. The board stated to Mr. Janney that it would not make any more contracts with Locker in the future. Of course, I looked up the proposition and read all the matter on it to be sure that it was a good proposition before going into it. I did as I thought to the best interests of the company at all times.

Redirect Examination.

Yes, I received fifty dollars a month. I turned over all letters and stubs, etc., of the company's to my successor. I was not in favor of the French contract at all.

(Testimony of Rodney T. Badger.)

Cross-examination.

The board discussed carefully every feature of the French contract; the most *objectional* feature was that this corporation should place stock on the French market and pay office rent and certain liabilities for expenses. **[151]** Submission to French government was also objectionable. It was urged because it would be easier to get the money in France. We did not sign it.

(By stipulation of both parties, testimony postponed to further date agreeable to both parties.)

(Continued July 6, 1912, 10 A. M.)

(Pursuant to agreement between parties, following testimony is introduced.)

[Testimony of Duncan MacVichie, for Plaintiff.]

DUNCAN MacVICHIE, witness for *defendant,* testified:

My name is Duncan MacVichie. I live in Salt Lake City. I am fifty-two years of age. I am a mining engineer. I have been such twenty-five years or more. I was with the Standard Oil people in Wisconsin and Minnesota from 1889 to 1897, and then in charge of the Mercur from 1897 to 1900, and then with the Bingham Consolidated Mining & Smelting Company for, I think, eight years. I was general superintendent in all of these. I have examined the Little Gem property in Tenabo, Lander County, Nevada. I did so in December, 1908. I was making a report for the board of directors. The ones I examined were: The Little Gem, four lode claims, a total of seventy acres; the Nevada-Phoenix, three lode

(Testimony of Duncan MacVichie.)

claims, fifty-two acres; and the Two Widows group, one and a fraction, twenty-one acres, a total of one hundred and forty-two acres. These claims all joined each other. The claims of the Gem Group joined each other; the Ollie, Winnemucca and Reno. The Phoenix group contained the Gold Note No. 2, Phoenix and Standard. The Two Widows was a full claim. The workings of the mines are as follows: It is developed by an incline shaft to a depth on the plane of the vein of about 375 feet; and by six levels consisting of the 60, 90, 100, 200, 300 and bottom levels. There are upraises and two stopes, a small stope on the 200 foot level. I want to add here that I was unable to reach the bottom of the incline, due to water. It was about twenty feet deep. So that I am unable to say just what the bottom of the incline is like, but the workings are pretty thorough above the water level, which block out the ore very thoroughly. There is no ore in the 60, 90 and 100 foot levels. The east drift on the 200 foot level is approximately three hundred feet in length. This drift bears to the north quite rapidly as it extends from the incline. The 200 [152] foot level west is approximately forty-five feet in length. The 300 foot level east, or easterly, would be approximately one hundred feet in length. There is an incline driven in a westerly direction from just below the 300 foot level, to ninety feet in length. It is driven at about right angles to the strike of the vein. All of the levels show a well-defined vein and the 200 and 300 foot levels including the incline from the 200 foot level down, and the dif-

(Testimony of Duncan MacVichie.)

ferent raises, show a well-defined vein of merchantable sulphide copper ore. I estimated 7,783 tons straight smelting ore and 17,257 tons of concentrating ore was blocked out and ascertained by me. The smelting ore contained .125 ounces of gold; 17.46 ounces of silver; 5.92 per cent copper. I did not get the iron contents.

Figuring copper at 12 cents and silver at 56 cents per ounce would give a net value of $13.38. The present value is approximately $21.13. The gross value of a ton of matte is $175.20. Seven tons of ore goes into it. There would be $92.65 profit per ton of matte. That represents seven tons of ore. It is absolutely necessary to put on a concentrating mill in order to make a success of the property. (Conclusions read.) The proposition of this company present possibilities a little beyond the average. The Little Gem will not take a large amount of money to demonstrate its value. The Nevada-Phoenix, with its high-grade ore, makes possible the mining of narrow veins profitable. The Two Widows has ore of good commercial value. I do not consider the situation as favorable. I think it a very good geological venture. I consider that at the time I examined these properties, that twice the amount of ore in sight was capable of being obtained.

Cross-examination by Mr. SKEEN.

I do not do my own assaying. The Union Assay Office does all of it for me. They can verify the assays if you wish. It cost about $4.00 per ton to mine the ore in 1908.

(Testimony of Duncan MacVichie.)

Redirect Examination by Mr. EDWARDS.

The prospective values on the Gem and the Phoenix are very attractive. Above the ordinary. On the Two Widows there was no ore developed there. The conditions are not particularly favorable to the Two Widows. In the Nevada-Phoenix there is considerable ore exposed. It has considerable value. [153] The ore is good quality. I think I would give ten thousand dollars for it.

To the 7,783 tons of straight smelting ore, this gives a net value of $111,530.39, on the 17,257 tons of concentrating ore, it gives a net value of $75,240.-52, making a total net value of $186,771.91. The cost of erecting reduction works is:

Concentrating mill	$25,000.00
Matting plant	30,000.00
Total	$55,000.00

leaving an estimated profit on the present available ore of $131,770.91. This is the most reliable plan of estimating in the United States. Suggested by the "Engineering and Mining Journal" of New York City.

(Adjournment to next day.)

(Continued September 2, 1912.) (On absence of John Janney, postponed.)

Subpoena for John Janney introduced, proof of service by Wm. J. Cowan (Adjournment of meeting.)

Continuance, September 3, 1912, 2 P. M.

[Testimony of John Janney, for Plaintiff.]

JOHN JANNEY, witness for complainant, testified:

I am John Janney, secretary of the Tenabo Mining & Smelting Co. I have the record of said Co., consisting of book for transfer of stock kept by New York Trust Co., register for certificates showing stock registered by it; book showing vouchers for items of expenditures and cancelled checks. I told Miss Robertson to look up the cash-book, but I could not find it. I also have the letter files of letters received and sent. I have expressed the stock certificate books to Carson City. I will have those books at the trial at Carson City. I also have the minute-book.

(Witness dismissed and *order* to bring books of company to Carson City trial.) (Adjournment to September 4, 1912.)

Notice by attorneys for plaintiff that the testimony of plaintiff would be held on February 23, 1912, by way of deposition and evidence in trial. Same accepted by attorney for defendant.

Complainant rests. **[154]**

Defendant's Testimony.

Testimony of Charles D. Bates, the complainant, before John W. Christy, Standing Examiner, at Salt Lake City, Utah, on the 4th of September, 1912.

The complainant was represented by W. H. Wilkins, and the defendant by H. C. Edwards, their respective solicitors and counselors.

[Testimony of Charles D. Bates, for Defendant.]

CHARLES D. BATES, the complainant, being called as a witness in behalf of the defendant, was first duly sworn and testified as follows:

Direct Examination by Mr. EDWARDS.

My name is Charles D. Bates. I am forty-eight years of age, and Assistant Secretary of the Intermountain Life Insurance Company. I reside at Salt Lake City, Utah. I am a stockholder of the defendant company. I have not, and never had, a certificate of stock. I am the complainant in this case. I purchased the stock of P. B. Locker, paid him for it. He did not deliver me a certificate. He showed me that he had made a transfer of the stock. He showed me the records of a Trust Company in New York, showing that I was a stockholder, and I gave him my proxy to vote. The record he showed me was supplied by a Trust Company in New York. I am not certain of the name; it had an oath attached. I cannot tell you what Trust Company it was. As near as I can remember it was two years ago last January or February. This record showed that I had two hundred shares of stock; the record was written on a piece of paper, a list of all the stockholders certified by this Trust Company. It was certified that this stock was held in trust, or in a pool, showing the transfers that had been made from a certain date up to another certain date. I have an attorney to represent me in this case, Mr. J. D. Skeen. I have not paid him any consideration or retainer. I have not agreed to pay him any compensation for the services

(Testimony of Charles D. Bates.)
which he renders in this suit. I cannot say that there is an understanding that I will not be held liable for any compensation to him. I have had no agreement with him; the matter has not been discussed with Mr. Skeen. It was discussed by me with another party, Mr. George S. Kimball. I cannot answer what was the substance of the agreement or understanding with him in reference to the payment of Mr. Skeen's attorney's fees without reference to other matters. I am a bookkeeper **[155]** and in matters of that kind I depend on records rather than my memory. I do not remember the substance of my conversation with Mr. Kimball in reference to who was to pay the attorney's fees of Mr. Skeen in this case. Mr. Kimball would pay the attorney's fees. He became responsible for it. Mr. Kimball discussed with me the facts that are set forth in the bill of complaint before the suit was brought. After the discussion with Mr. Kimball I went to the office of Mr. Locker and Mr. Janney, I suppose the office of the defendant company, and made some inquiries. I saw there Miss Robertson, the stenographer. I asked there and was shown some books, I cannot tell just what. I inspected the books in a cursory way. I looked for something but I have forgotten now just what it was. I looked for one thing, I cannot tell you what it was, I do not know, do not remember. At the time I filed the complaint there were some of the things that I did not know, and some of the things I think I knew. I could answer whether I had personal knowledge as to the facts stated in the

(Testimony of Charles D. Bates.)

complaint if I had a copy of the complaint. I can't tell which I knew, I want a copy of the complaint before I answer. The stock was originally purchased, that is it was accepted by me as payment for work. I want to explain that I had never been able to get anything as the result of my work and I could not sell the stock, and Mr. Kimball thought there was a chance for me to get the value of the stock out of it, that was by bringing suit. He did not state to me that by bringing the suit he thought he would be able to sell the stock the details were not discussed. I had the stock and was anxious to get my money out of it. It is in substance true that when Mr. Kimball represented to me, or stated, that if I brought this suit he thought I could get the money out of the stock, then I agreed to bring the suit, become the plaintiff and Mr. Kimball would pay the expenses of the suit and the attorney's fees. That is the substance of it. I won't say it is not true, but it is not the whole truth. I cannot, without referring to some memoranda and records, state to you the rest of the truth of the matter. I have not got those records with me, it might take two or three days to obtain them. They are in my old office and I have not been in the office for over a year. They have changed girls there and I know nothing about the files, **[156]** everything would have to be looked through. With reference to the other facts that I referred to, it is merely a matter of language. I would state it in this language: That if the Mining Company was brought into condition so that the mine could be

(Testimony of Charles D. Bates.)
worked the stock might be of value, where, under the conditions as they existed at that time, it did not appear to have any value. I got the idea that it had no value. I cannot answer any better than to say that I had no idea as to how this lawsuit was going to result in putting the mining property into the condition that I thought it ought to be. The result of the lawsuit I knew was to have a receiver appointed; no other result was supposed to be obtained. Mr. Kimball did not discuss with me as to what the result of the receivership would be, or as to why I wanted it. I read the complaint before I signed it. I cannot tell without seeing the complaint that it contained many things upon which I had no information whatever. I signed it in Mr. Skeen's office. I did not discuss with Mr. Skeen the fact that there were things in there that I knew nothing about. As to whether or not the books of the company were kept in such a way as to record the transactions of the company. I looked at the books I spoke of in a cursory way for certain information; I cannot call it an examination. I could not tell from that examination whether the transactions of the company were properly recorded or not. I would say that I depended upon the word of another man. I cannot tell you what other man; it is a matter of record; a man don't remember names. It was not Mr. Kimball. I cannnot tell you who he was; I cannot tell you what he told me. I read the minutes of the meeting in which the giving of a contract by the defendant company to Mr. Locker was recorded. That

(Testimony of Charles D. Bates.)

is all I know about it. I could not tell by the looks of it whether it was in good faith or not; nobody told me whether it was made in good faith or not. They would not naturally make such a contract unless in good faith, and it was a supposition on my own part, when a thing of that kind exists, it was made in good faith. I have no knowledge to the contrary at this time and had no knowledge to the contrary at the time I signed the complaint. I do not know whether or not the defendant company is insolvent; I believe it to be insolvent; I do not know any facts from which I believe that the company is insolvent; I have no facts in my memory that I draw the belief, [157] or form the belief, that the company is insolvent, the facts are a matter of record. I have never made any investigation to see what the value of the defendant's property is; I have never been down there to see. I signed the complaint that was prepared under the supervision of Mr. Skeen and Mr. Kimball. I was not willing to sign any complaint. I was willing to sign that complaint. No, I did not sign the complaint without making any other or further investigation, and with no further knowledge with reference to the facts contained in it than those I have already related. I do not know, I cannot tell you from memory what other facts I had knowledge of at that time, and what other investigation was made; it is a matter of record. I have stated all the facts within my recollection other than those which are a matter of record. Mr. Kimball did not discuss with me the fact that he wanted a nonresident of Nevada

(Testimony of Charles D. Bates.)
to bring this suit. He told me, I knew the suit was to be brought in Nevada. I did not discuss with Mr. Kimball why he did not, as a stockholder, bring the suit. I do not think the matter was discussed with Mr. Kimball at all, that if a receiver was appointed there would be a sale of the property. I had the opinion that Messrs. Locker and Janney influenced the Board of Directors of the defendant company to execute the contract for the sale of stock in France. The fact that they did it was *prima facie* evidence that Locker and Janney influenced the Board to do it. This was simply from my acquaintance with Mr. Locker and knowing his disposition. When I stated that the contract was made in good faith I meant by good faith, that the contract was to be carried out, that was my understanding of the meaning of good faith. I can't think that any man, any business man, could make such a contract and think that he was doing for the best interests of the stockholders. That is the only reason in my memory for thinking that the contract was not made in good faith by the Board of Directors. That is the only thing I can think of now; further questions might bring out something else. When the suit was brought it was my idea that if the suit was successful it would prevent the carrying out of the Locker contract, and the sale of stock under it. It was my desire to prevent the sale of stock under that contract. It would be very hard for me to get away and go to Carson City to appear as a witness in this [158] case. I would prefer not to go. I am not willing to go. I will not

(Testimony of Charles D. Bates.)

be there at the trial of the case. My interest is not enough to pay my expenses. If my expenses were paid and the matter of my position with the company is taken care of I would go. I mean at the present time there is a good deal of work, a good deal of responsibility devolved upon me that can hardly be shifted at a moment's notice. I mean that I would have to get the consent of the company to absent myself for two or three days. I won't answer either way whether I think that can be done.

Cross-examination by Mr. WILKINS.

With reference to the facts relative to the defendant company, that we had of record in our office, we had done work for them, multigraph work and work of that kind, for them each year. The complaint was the result, much of it, of information that is of record in our office at the present time; there are several things, copies, that are matters of record. The work was done by others than myself. The work I had reference to was multigraph work. The matters I testified to this morning were simply from my recollection. I do not wish to be understood that the allegations in the complaint were based simply on what I have testified to. The records of the facts which we had are accessible if I had time to dig them up. The facts which were given to me were some of them given by other parties than Mr. Kimball; Mr. Kimball in common with others. They were to some extent the result of my own investigations. The stock that I had received was given to me in payment for the work that had been done for the defendant

(Testimony of Charles D. Bates.)
company, two hundred shares. The record of this stock being in my name was shown to me in Mr. Locker's office. I do not think he personally did so; I think it was his stenographer. That record was the record of a Trust Company in New York, I am not sure of the name. That record showed that there had been transferred to me two hundred shares of stock and Mr. Locker asked me to give him a proxy to vote these shares, which I did more than once. I have never realized anything out of this stock. My idea in bringing the suit was I understood the mining property was not being worked and was good property, and by bringing the suit it might be brought into shape so it could be worked. I have been unable to dispose of my stock, or get anything out of it. It was for the purpose of having the company, or the affairs of the company, [153] put in hands that would manage it properly and bring about a value to my stock that I brought this suit. The allegations of the complaint were based upon facts which were obtained in part by me and were given to me by others. I had confidence in Mr. Kimball as stating the truth. I would be willing to attend the trial providing my expenses were paid; if Mr. Edwards would arrange with the company, getting consent that I be absent two or three days to attend the trial. I know with the work there is on hand in the office I should not get away. I feel that if I went away without consent it would jeopardize my position. My interest in the defendant company in this suit is simply confined to the value of two hundred

(Testimony of Charles D. Bates.)

shares of stock, which would not justify me in going to the expense of going to Carson City and also the risk of losing my position. I consider that the evidence to be introduced in this case are largely matters of record. My interest in the suit can be maintained without my presence, any testimony that I could give would be taken from the record.

Redirect Examination by Mr. EDWARDS.

My memory is not very good as to the matters that I have testified to here. I brought this suit with the intention of preventing Mr. Locker from selling any stock under that Paris contract. As to whether or not that stock could be sold to net the company more in any other way than the way in which Mr. Locker was undertaking to sell it, I have no knowledge of anything that might happen in the future. Mr. Locker and I have always called ourselves friends, there was no antipathy between us. If I should say that I did not like Mr. Locker very well I would not be exactly telling the truth. There are lots of people you don't like or dislike, as to him my like or dislike was neutral. I cannot tell whether I discussed this matter with Mr. C. C. Wiley before the suit was brought. I may have. I do not remember of any correspondence with him. I do not know of any acts of mismanagement that have occurred with reference to the Tenabo Mining and Smelting Company. I believe there have been acts of mismanagement; I do not know so as to enumerate them; the complaint states them. I mean to say that I made a complaint and do not remember what was put in it, and signed

(Testimony of Charles D. Bates.)
it, and I believe it to be true. I do not care what complaints I had; I tried [160] to tell you that I do not remember. It was talked over with Mr. Skeen what was to be put in the complaint in my presence and with others. Mr. Kimball was not there every time. I have talked with Mr. Skeen when Mr. Kimball was not there. Mr. Kimball was the informant to me of some of the facts that are alleged in the complaint. I cannot tell you who of the others ever told me that the corporation was insolvent; I do not know that it is insolvent. I was told it was in a bad way; nobody ever told me it was insolvent. I believe it was, I was told that it was believed to be insolvent. I cannot tell you who told me that without reference to a book. I do not remember that anyone ever told me that there were many obligations that were due and owing that were not paid. I tried to dispose of my stock and could get nothing for it. I assumed it had no market value. As a stockholder of the company I would naturally suppose we would be responsible if we would let him sell something of no value to those poor people over in France. I think I stated that my motive was to try to get the mining property in shape so that it could be worked and made of some value, but I did not want Locker to sell that stock at the price he was permitted to sell it under the Paris contract. My stock had no value. I was interested in my own stock, not in anybody else's. If my stock were made valuable by working the mine, everybody's stock would be made valuable. I had no idea that the money that Locker might get

(Testimony of Charles D. Bates.)

would ever help work the mine. I was of the opinion that if Locker got any money it would not be used to work the property. I had no idea what it would be used for. It was one of my ideas that if Locker got money it would not be used in working the property. My idea was based on my general knowledge of Locker's character, the man for whom I had no like or dislike. I expected very little of it would ever reach the company. That was because I thought Locker was dishonest.

Cross-examination by Mr. WILKINS.

In stating that I do not know what was in the second complaint, I mean that I do not remember without refreshing my recollection. I do remember the sole object of the suit was not to prevent the sale of the stock under the Paris contract, but the object of the suit was other than that. That was one of the details. **[161]**

[Testimony of Alfred E. Raleigh, for Defendant.]

Mr. ALFRED E. RALEIGH, for the defendant, testified as follows:

My age is 42 years. I reside at Tenabo, Nevada, and have since 1905, am in mining business and have been for 35 years. I went to Tenabo when the camp was just struck, and have watched its development closely. Have been in the employ of the Tenabo Mining & Smelting Company and was before that. I was in the employ of the Tenabo Consolidated Mining Company. They owned the Gem claim. Before that, I was in the employ of the Reliance Milling &

(Testimony of Alfred E. Raleigh.)
Mining Company. That company also owned the claim prior to the time that the Tenabo Consolidated came in. I supervised the opening up of that claim. There is a fissure vein on the claim, and it appears upon the surface. It can be traced for 500 feet. The incline shaft that has been testified to by Mr. McVichie in his report is the shaft or incline from which the main workings have been done upon the ground. It is about 320 feet deep. The length of the longest shaft is about 400 feet. I have discovered an ore chute in this vein. It is about northwest with reference to the collar of the shaft. The ore chute that I have discovered is about 350 feet and runs from five feet at the surface to four feet at the bottom. I followed the vein down from its entire depth. The vein is fourteen feet wide there, with good walls. Between the collar of the shaft and the lowest level a drift has been run about fifty feet. There is another one at one hundred feet, running to the north about 20 feet. The next level, about 50 feet deeper than the shaft, there is a cross-cut, the drift running about 75 feet. At 300, there is a drift running about 350 feet to the northwest, and opposite that, there is a drift running to the south about 600 feet, and down at the 300, there is a drift running to the east, and there is where the forks the main shaft that they are running now—the ore chute—turns to the south; and there is a drift running off from that 60 feet; then this long part of the incline runs on through—that is the 400 foot incline. There is a raise in that incline and a good deal of stoping done in there.

(Testimony of Alfred E. Raleigh.)

Those workings generally penetrate the ore chute. The ore chute extends from the lowest level made in the mine to the surface. It is continuous all the way. There is nothing in the lower workings to indicate that [162] the vein will not continue into the depth. It all indicates that it will. About the 28th of March last I saw Mr. Kimball and Mr. Sizer going down into the Gold Quartz. I do not know what they did. I do not know that they examined the Gem. I told them I would not have anything to do with their examination unless there was instructions from the president.

Cross-examination.

The length of your chute is about 360 feet. I have seen it at all the distance. It is continuous that entire distance. In the last three years, we have not added in depth to the main shaft or incline nor to the main level or the shafts or levels in any part of the mine. I am sinking a shaft from the surface there now in order to get air. We have run a raise from just on top of the water 290 feet depth. The length of that raise is 90 feet. When I left the other day, the air shaft was down between 35 and 40 feet. We have done some assessment work on the surface. We have done some work on the other mine there in the last three years. I have done the work on all eleven claims. In the Copper Hill group there are four claims, and we have done $400.00 worth of work on those claims each year in driving a tunnel. That tunnel, after the first fifteen feet, is all in copper ore. The development that has progressed has increased

(Testimony of H. C. Edwards.)

the favorable conditions of the geology of the property. We have taken out, but have not shipped any ore. I have taken out ore all the time.

At the Copper Hills, we did that as assessment work. The work in taking out the ore was simply the equivalent of $100.00 on each claim. There are eleven claims. The Copper Hill group of claims is located about twelve miles from the Gem property.

[Testimony of H. C. Edwards, for Defendant.]

Mr. H. C. EDWARDS, on behalf of defendant, testified as follows:

Direct Examination by Mr. ASHTON.

My name is H. C. Edwards. I reside in Salt Lake City. I am acquainted with the circumstances connected with the consolidation of the Gem Consolidated property with the Tenabo Consolidated properties. My recollection serves me that I was in New York City in July or August of 1908, stopping at the Imperial Hotel, and Mr. Locker was there, trying to promote the sale of the stock of—I think he called it the Tenabo Consolidated Mines Company. [163] which consolidated the Two Widows group and a lease upon the Phoenix, and I was pretty well acquainted with the ground in as much as I had been over it, and he stated to me that he had several people that were interested in buying some of the stock, and he wanted me to go with him and meet them. After visiting these people with Mr. Locker, I stated to him that it was apparent to me that the development of this mining property was not sufficient to interest the people that I had been talking to with him. Mr.

(Testimony of H. C. Edwards.)

Tyree, in the course of a few days, in conversation with him, stated that he had been absolutely unable to flood any of the stock of what was then the Gem Consolidated Company, and I stated to Mr. Tyree at that time that I believed that Mr. Locker was in touch with some people with whom they could finance a company, provided the two companies were consolidated, and shortly after that, there were several conversations along that line. Shortly afterwards, I returned to Salt Lake City, and Mr. McCornick instructed me to bring a suit to foreclose the mortgage that was against the Gem property, and Mr. Tyree and Mr. Locker, as I remember it, came to Salt Lake and entered into negotiations for the purpose of consolidating the two properties. Mr. McCornick was crowding his foreclosure suit along, and it was finally agreed that if these people would finish up their consolidation and give Mr. McCornick reasonable assurance that they could finance the company, that he would forbear the immediate taking of a decree in that suit.

Defendant's Exhibit "J" is a promissory note, which was secured by a mortgage upon the Gem Mining Claim, and foreclosure proceedings were commenced on that mortgage by McCornick & Company, and my recollection is I represented him as an attorney.

Defendant's Exhibit "K" is a statement which I made to Mr. McCornick, showing amount of fee which I was willing to take in the foreclosure proceedings if it proceeded no further, and also the items of expense which I had advanced in the filing of the suit.

(Testimony of H. C. Edwards.)

That bill was sent to Mr. W. S. McCornick. It was paid after the money was received from the sale of a big block of stock. I think it was 165,000 shares of stock by the reorganized company—that is, the Tenabo Milling & Smelting Company—and Mr. McCornick called on me to tell him what my charge against him would be, and when it [164] was given to him, both my bill and the amount due for principal and interest upon the note and mortgage and the costs were submitted to the Tenabo Milling & Smelting Company, and my recollection is that two separate checks were issued by the defendant, one to Mr. McCornick and one to me. I am the H. C. Edwards who was a member of the board of directors. As to the services the directors rendered, we held a number of formal meetings and we held a great many informal meetings, discussing the affairs of the corporation. As to the value of our services, mine may not have been of but little value as an ultimate result obtained for the corporation, but my services rendered were far in excess of $50.00 per month, because I know that there was no month when we did not spend more than a day in the consideration of the business of the company, and my time was worth a great deal more than I received from the company. I received nothing from the company for the services which I performed as director. However, there was a resolution passed which authorized the payment to me of $50.00 per month, but I waived that when I found that the finances of the company were not being

(Testimony of H. C. Edwards.)

put in shape as rapidly as I would like to have seen them.

Cross-examination.

Some of the services I rendered were embodied in the minutes of the corporation. Many, many meetings discussing the subject matter of the minutes were held, and the minutes only incorporated the ultimate acts of the board of directors. We held several meetings, devising ways and means for doing assessment work. My recollection is that we were without funds at that time, but I could not say how many. Another item was considering contracts that were presented, applications for contracts by various parties desiring to sell the stock. As I recollect, the first application was made by Mr. Locker. That consumed a great deal of time in discussion. I cannot say how much time was consumed with him. We had various meetings on the subject, and they would run from four o'clock, a great many times, until past six o'clock, the subject matter discussed was the matter with Mr. Locker, and what would be best calculated to fund the treasury of the corporation. My best recollection is that we had two or three meetings to discuss the Locker contract. They consumed from four to six o'clock, and then we entered into the contract. [165]

When I spoke of several applications having been made for the sale of stock, I referred to the several Locker contracts. Others had been applied for by Mr. Locker, one in 1908 or 1909 for the sale of stock in France. I do not think of any other now.

Then there was an effort made down in New York

(Testimony of H. C. Edwards.)

to put this stock on the curb, and communications came to the company from various sources, and that resulted in a number of meetings, and the subject matter of it, and all papers they wanted signed and a lot of things of that kind.

In connection with the foreclosure of the McCornick mortgage, the services rendered were the bringing of the foreclosure proceedings, and a campaign for some time, trying to get these people to pay the thing. I stated to Mr. McCornick that I was willing to accept the sum of $1,000.00 and he agreed to that, and in the negotiations, it was paid by the defendant company. (The record of the foreclosure proceedings above mentioned is marked Defendant's Exhibit "M" and admitted in evidence.)

Redirect Examination.

I had the contract respecting the attorney's fee with Mr. McCornick prior to the organization of this corporation defendant. The agreement was that I was to have the attorney's fees, which was given by the Court on the foreclosure proceedings, and there was—my recollection is—a ten per centum attorney's fee prayed for in the complaint. I think the suit was held off at the request of Mr. Tyree, and the organization of the Tenabo Milling & Smelting Company. There was later an arrangement between me and Mr. McCornick with reference to the attorney's fee in the event that it did not come to a decree, and that was $1,000.00.

2

No. 2441

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

TENABO MINING AND SMELTING COMPANY, a Corporation,

Appellant,

vs.

CHARLES D. BATES,

Appellee.

VOLUME II.
(Pages 273 to 520, Inclusive.)

Upon Appeal from the United States District Court for the District of Nevada.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

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FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

(Testimony of H. C. Edwards.)

Recross-examination.

I did not bring this foreclosure suit against the Reliance Company until after I returned from New York where I had met Mr. Locker and Mr. Tyree. They did not disclose the matter to me while I was there. I suggested it to them and I think that was the origin of it.

Tuesday, September 10, 1912, 10 A. M. [166]

[Testimony of John Janney, for Defendant.]

Mr. JOHN JANNEY, on behalf of defendant, testified as follows:

The defendant company has paid out no salaries to officers between the 30th day of June, 1910, and the 28th day of November, 1910. No disbursements were made by the company during the period from June 1st to June 30th, other than those recited in Exhibit 39.

The defendant corporation has held two stockholders' meetings since its organization. The instrument dated May 13, 1911, is the minutes of the meeting held on that date. Notices were sent to stockholders. A notice is attached. Complainant's attorney, Mr. J. D. Skeen, was there. Those present in addition to Mr. Skeen, were W. Mont Ferry, Benner X. Smith, E. O. Howard and John Tyree. These are the original minutes of the meeting. They were approved at a subsequent meeting.

The record of that meeting, as written there, is a record that is kept by the stenographer in our office, Miss Robertson. There was another stenographer for that meeting, a stenographer brought there by

Mr. Skeen. Mr. Skeen's stenographer took the entire occurrences of the meeting and Miss Robertson got the substantial part of it rather than the entire occurrences. When those minutes were read, it was proposed to get a copy of Mr. Skeen's minutes to substitute for those minutes. Mr. Skeen's stenographer did not furnish us those minutes. Demand was frequently made upon him to do so, and he kept putting us off from week to week, and finally he said Mr. Skeen had asked him not to do it. So when we found we could not get Mr. Skeen's report, then those minutes there made the best minutes we could get, and inasmuch as they were approved, subject to the action of Mr. Skeen's stenographer to supplant them, then those are the best minutes we have, and it is an accurate account of what happened. That is a memorandum of the minutes in complete form, from which minutes we intended to be filed after Mr. Skeen finished his copy. They contain an accurate statement of what occurred at the meeting.

As secretary of the defendant corporation, I addressed a communication to Mr. J. D. Skeen, attorney for plaintiff in this case. I have a copy of it. It was with reference to this meeting. I addressed a letter to Mr. Skeen and sent him a copy of this meeting, and that letter is already in the [167] record. The letter handed me is a copy of the letter which I sent Mr. Skeen. This letter is a copy of a letter signed by Mr. P. B. Locker, which I sent to Mr. Skeen. There were two letters written to Mr. Skeen on this same subject. I sent Mr. Skeen a letter enclosing a copy of this letter for Mr. Locker. The let-

(Testimony of John Janney.)

ter to Mr. Skeen, dated April 28, 1911, signed P. B. Locker, has not been introduced yet. It is addressed "Tenabo Milling & Smelting Company" and signed by P. B. Locker. (Letter admitted in evidence and marked Defendant's Exhibit "O.")

The letter shown me, dated June 12, 1911, is a copy of a letter that I wrote to Mr. Skeen on that day. (Letter admitted in evidence and marked Exhibit "P.") I told Mr. Skeen that the contents of that letter would be considered at an adjourned meeting of the stockholders, and that I wished he would be present. Exhibit "Q" is a letter received from Mr. Locker and addressed to the Tenabo Milling & Smelting Company, under date of August 18, 1911. I received it as a letter to the company. (Letter marked Defendant's Exhibit "Q" and admitted in evidence.)

Mr. SHANK.—Objected to on the ground that it is incompetent, irrelevant and immaterial and not the best evidence, and is a self-serving declaration.

I am interested with Mr. Locker in other operations than those concerning the defendant company, and during the last two years have sent money and securities to Mr. Locker in France. I sent him in January of this year some securities worth about $5,000.00. They were shares of stock in the French Mining corporation and sent at his request. I have also received moneys from Mr. Locker. There was $900.00 sent for me to take up a draft against those securities. and there was $1,000.00 sent me later on account of the same transaction, to purchase additional securities of the same kind. The money sent to him was

to purchase additional securities for the same business.

I was not present at the board of directors' meeting when the first French contract was considered. I was not a director of the company at that time. There was a French contract proposed to the company, which was never adopted, before I became a director. The first contract that the company approved was approved with Mr. Locker while I was a director. I was present at the meeting but did not take any part in the voting. When we got down to Mr. Locker's contract, I then asked to be excused and withdrew from [168] the meeting and made a statement that I thought it would be embarrassing to the rest of the directors to consider the matter because of my being interested. I told them I was associated and interested with Mr. Locker in the contract. That is why I withdrew from the meeting.

We have a list of the company's present stockholders. The instrument shown me, dated June 28, 1911, is a list of stockholders, certified by the Windsor Trust Company. It contains the names of all the stockholders, but of course there are certain certificates of stock authorized by the company and not issued, and they are not in the list. They are in the minute book. This list contains all except three or four. A copy of this list is attached to the deposition of Mr. Ferry.

Defendant's Exhibit "R" is a copy of a commission contract to Mr. George Kroll. (Defendant's Exhibit "R" admitted.)

(Testimony of John Janney.)

Cross-examination.

I was present at the meeting when the French contract was made and stated to the board that I desired to be excused from participating in the business. I signed the minutes to that meeting. The minutes referred to where they passed the Locker contract bear date of March 5th, 1910. These minutes begin on page 30 and run to page 36. You will find in the minutes that all of the minutes that voted on the Locker contract I did not vote. On the last resolution, I find the minutes as follows: "Ayes, Messrs. Ferry, Howard, Smith. Mr. Janney excused." That was December 13th, 1910, and seems to be a modification of the Locker contract.

I cannot remember any reason why we held three meetings and drew three separate sets of minutes for the 5th of March. The meetings at which these various transactions involving the Locker contract and subsidiary contracts were entered into. At the two other meetings at which the subsidiary contracts were considered, I was present and the resolution and vote for the different contracts were carried unanimously, and I signed the minutes as secretary. I was willing to approve all of the contracts that made the contract in which I was interested effective.

I was willing to approve anything that would bring this company money in a legitimate way. I told Mr. Skeen that Mr. Locker had a contract for [169] 75,000 shares of stock as subscribed. I did not tell him that out of that 125,000 Mr. Locker would realize 75,000 and 50,000 would be the company's share. I

(Testimony of John Janney.)
did not tell him that Mr. Locker's share would be 75,000. I told him this company was about to be financed in France by a syndicate of underwriters; that these gentlemen had expended about $30,000.00 in the expense incident to getting to the point that they had gotten, and that they had a contract with these underwriters which provided for their taking *firm* 75,000 shares of the stock and paying for that at the rate of $1.40 per share. I do not remember attempting to show him how much the company would get out of this. I said the company would get $.50 a share net. This conversation was between me and Mr. Skeen.

I did not write up these minutes and put them in the minute-book because Mr. Skeen promised that he would let me have those others. I waited on him week in and week out and the thing got stale and got stuck in a pigeon hole and I forgot it. I think it was two or three months we were trying to get it. The defendant corporation paid on March 28th, 1910, to Mr. Howard, $50.00; to Mr. Ferry, $50.00; to Mr. Pingree, $50.00; to Mr. Smith, $50.00; and to Mr. Janney, $50.00. That is stated in line two of the disbursements of report to the Attorney General, of June 30, 1910. (Sheets of stockholders' meetings of May 13, 1911, marked Exhibit "S.")

Defendant rests.

The COURT.—I think, gentlemen, I will admit those letters addressed by Mr. Locker, and those letters identified by the witness Janney to have been written to Mr. Locker; but there was one letter ad-

(Testimony of John Janney.)

dressed by Mr. Pikard, the attorney, to the company, which I do not believe can be admitted; his signature is not identified, and while it is in testimony that he is the attorney, there is nothing to show that the letter came from him, except what purports to be his signature is attached to it. The letters which were addressed to Mr. Janney by Mr. Locker, I think, are nearly all of them headed "Tenabo Consolidated Mining Company," that seems to be the subject, and it is entitled as the subject, and inasmuch as he was the secretary of the company and Mr. Locker was acting for the company, either as agent or under this contract, in the sale of that stock, it seems to me those letters, if relevant, are admissible. If there is any question on about that, [170] I would like to hear from you.

Mr. EDWARDS.—No; so far as they are material to the issues in this case, we have no objection to them at all.

The COURT.—I have not looked over any of them to determine their materiality. Of course, if they are immaterial, I shall not consider them.

Testimony closed.

The following exhibits were duly offered in evidence and received:

Complainant's Exhibit No. 1—Articles of Incorporation [of Tenabo Mining & Smelting Co.].

Article 1. The name of this corporation is Tenabo Mining & Smelting Company.

Article 2. The location of the principal office of this corporation in the State of Nevada is at the First

National Bank, in the town of Elko, County of Elko, and State of Nevada.

Article 3. The objects and purposes proposed to be transacted, promoted and carried on by the corporation are to construct, purchase or otherwise acquire, maintain and operate tunnels, sluices, reservoirs and ditches for mining, irrigation and transportation purposes, also to purchase, lease or otherwise acquire lands, mills, mill sites, tunnel sites, buildings, machinery power-houses, pumping-plants, pumping machinery dump rights, ditch rights, water rights, flumes, pipes, pipe lines, private railways, private tramways private roads, easements, franchises and licenses; also to purchase, construct, lease or otherwise acquire, operate and maintain electric lighting and power plants, buildings, machinery, appliances and equipment appertaining thereto; to purchase, construct, lease or otherwise acquire, operate and maintain telegraph and telephone lines for the transmission of messages and sound by electricity; to furnish water, electricity, power, heat and light for mining, milling, agricultural, domestic and other purposes and uses; to sell and dispose of the same to other persons or corporations; to develop, sell, store, contract for and generally deal in and dispose of plants for the purpose of extracting values from ores; to purchase, treat, refine, extract, reduce, crush, smelt, concentrate and manipulate all kinds of ores minerals and metalliferous substances; to engage in smelting, reducing, refining, crushing, milling, treating and assaying minerals and ores of all kinds; to buy, sell and deal in machinery, blasting power, fuse,

caps, implements, candles and merchandise of all descriptions; to purchase, lease or otherwise acquire lands for the purposes of erecting thereon office buildings, plants, work-shops, dwelling-houses, warehouses, stores, hotels and other buildings in connection with the foregoing purposes; to prospect for, locate and acquire by discovery, lease, license, option, purchase, franchise, grant, gift or otherwise hold, possess, enjoy and develop, mine, work, operate and exploit mines, mineral lands and claims and to carry on such business in all of its branches.

Article 4. The amount of the authorized capital stock of the corporation shall be three million dollars divided into one million five hundred thousand shares of the par value of two dollars each. The amount of the capital stock with which it will commence business is five hundred shares; and the amount of the capital stock actually subscribed is one thousand dollars.

Article 5. The names of each of the original subscribers to the capital stock and the amount subscribed by each and their post office addresses are as follows, to wit:

Name.	Postoffice Address.	Shares.
H. P. Clark.	Salt Lake City, Utah.	100
Lester D. Freed.	Salt Lake City, Utah.	100
R. T. Badger.	Salt Lake City, Utah.	100
C. S. Varian.	Salt Lake City, Utah.	100
H. C. Edwards.	Salt Lake City, Utah.	100

Article 6. The period of the existence of this corporation is fifty years.

Article 7. The members of the governing board

of this corporation shall be styled Directors, and shall be five in number.

Article 8. The resident agent of this corporation who shall be in charge of said company in the State of Nevada shall be R. H. Mallett, a resident of Elko, in the county of Elko, State of Nevada, whose office is at the banking house of the First National Bank in the said city of Elko.

Article 9. The capital stock of this corporation after the amount of the subscribed price or par value has been paid in shall not be subject to [172] assessment to pay the debts of the corporation, and neither the stockholders nor their private property shall be liable for the payment of the debts and obligations of this corporation.

Article 10. The power to make and alter by-laws is hereby conferred upon and vested in the Board of Directors of this corporation.

[Defendant's Exhibit "L"—Cablegram, Dated June 9, 1911, to Tenaboms.]

Cablegram.

June 9, 1911.

To Tenaboms,

Paris.

Defer issuing prospectus until corrected. Will be compelled to refund, to buyers, if we do not notify them.

TENABOMS.

[Defendant's Exhibit "L"—Cablegram, Dated June 10, 1911, to Tenaboms.]

Cablegram.

June 10, 1911.

To Tenaboms,

Paris.

Speedy action is absolutely necessary by stopping stock sales. Owing to false representations. In order to put a stop to sales orders must be telegraphed in plain language to banks. Telegraph what action has been taken concerning.

[Defendant's Exhibit "L"—Cablegram, Dated June 13, 1911, to Tenaboms.]

Cable.

Paris, June 13.

Tenaboms,

Salt Lake City.

There is no need to be anxious. No stock sold through prospectus. Franco-Amer. Bank have not delivered single certificate of stock.

[Defendant's Exhibit "L"—Cablegram, Dated June 11, 1911, from Tenaboms to Frambank, Paris.]

Cable Message.

June 11, 1911.

Frambank, Paris.

We do not approve—prospectus—Chariere & Co. Should follow engineer's report. Must not dispose of the stock. Refuse to accept money.

TENABOMS.

[Defendant's Exhibit "L"—Letter, Dated June 17, 1911, Tenabo Mining & Smelting Co. to Franco-American Bank.]

June 17, 1911.

Franco-American Bank,
22 Place Vendome,
Paris, France.

Gentlemen: We have received a circular from Chareire & Co., relative [173] the Tenabo Mining & Smelting Company. It misrepresents the facts and does not follow our engineer's reports. We do not wish to become a party, even directly, to a plan that is misleading to investors, and moreover we do not believe that the properties of this company require to be misrepresented. They possess substantial merit, which speaks for itself. The plain facts simply told are good enough. We therefore sent you the following cable on June 11th:

> "We do not approve prospects Chareire & Co. Should follow engineer's report. Must not dispose of stock. Refuse to accept money."

If we can dispose of this stock under the contract entered into with Mr. Bernard Desouches and with the Underwriters, we stand willing to do so, but would prefer not to sell out securities at all than to dispose of them in an improper way. With assurance of high regard, we beg to remain,

Very truly yours,
TENABO MINING & SMELTING CO.
By ————, Secretary.

[Defendant's Exhibit "L"—Letter, Dated June 28, 1911, Tenabo Mining & Smelting Co. to Franco-American Banque.]

June 28, 1911.

Franco-American Banque,
22 Place Vendome,
Paris, France.

Gentleman: With further reference to our cable of June 11th, we beg to enclose herewith certified copy of resolution of the Board of Directors. Until further orders from us you will not deliver any certificates of stock or accept money, though we are anxious and willing to comply with out contract with Mr. Bernard Desouches as soon as it may be possible for us to do so.

Very truly yours,
TENABO MINING & SMELTING CO.
Enc. JJ/NBR. ————, Secretary.

Certified Copy of Resolution of the Board of Directors of the Tenabo Mining & Smelting Company.

June 12, 1911.

Whereas, there has come to the notice of the Board of Directors of this company a prospectus mailed at Paris on May 27, 1911, and received at Salt Lake City on the afternoon of June 9, 1911, issued under the name of the Bank Chareire & Company of Paris, France, soliciting the purchase of the French Bearer Certificates of this Company, and

Whereas, said prospectus so issued contains statements, which are not founded upon fact, and mis-

representations as to the property of the company and the value of the same, and

Whereas, this company and its Board of Directors do not approve of said prospectus and the statements made therein, and disapprove of said representations and the use of said prospectus for the purpose of the sale of the said Bearer Certificates of this company, now therefore be it

Resolved, that the Board of Directors disapprove of the issuance of said prospectus and of the various false statements and misrepresentations contained [174] in the same, and that this Board should not allow any of its treasury stock or bearer certificates to be sold under such representations or any false representations, and that the action of the Secretary of the company in sending the following cablegrams be and is hereby approved:

June 9, 1911.

Tenaboms, Paris.

Defer issuing prospectus until corrected. Will be compelled to refund money to buyers if we do not notify them.

(Signed) TENABOMS.

June 10, 1911.

Tenaboms, Paris.

Speedy action is absolutely necessary by stopping stock sales owing to false representations. In order to put a stop to sales orders must be telegraphed in plain language to banks. Telegraph what action has been taken concerning.

June 11, 1911.

Frambank, Paris.

We do not approve prospectus Chareire & Co. Should follow engineer's reports. Must not dispose of the stock. Refuse to accept money.

Paris, July 4th, 1911.

Tenabo Mining & Smelting Co.
105 Mercantile Block,
Salt Lake City, Utah.

Gentlemen:

We beg to acknowledge receipt of your letter of the 17th of June contents of which have had our best attention. We have been in communications with your representative, Mr. P. B. Locker, and, in accordance with your instructions, we will not dispose of any of your stock or accept any money there against until we hear further from you. In the meantime, we remain, Gentlemen,

Yours truly,
BANQUE FRANCO-AMERICAN.
(Signed) P. COLEM (?)
FRANDENIKARY (?)
P. PON SPECIALE.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated June 26, 1912.]

(Loose Sheets) Minutes of Directors' Meeting.

The Directors of the Tenabo Mining & Smelting Co. met at their principal place of business in Salt Lake City, Utah, on June 26, 1912. All of the directors were present, except Director Janney, who is absent from the State. The following resolution

was proposed, seconded and duly adopted.

Resolved that the Treasurer be and he is hereby authorized to pay on account of Directors' fees, to the following directors, the sum of $150.00:

To W. Mont. Ferry.
To E. O. Howard.
To John Pingree.
To John Janney.

There being no further business the meeting adjourned. The undersigned directors hereby approve of the foregoing minutes.

(Signed) W. MONT. FERRY,
E. O. HOWARD,
BENNER X. SMITH. [175]

November 21, 1911.

Resolved, that the President of this company be authorized and instructed to see that the assessment work for the current year is done and proper proofs of labor recorded.

Resolved, that the Treasurer be authorized to issue check in payment of same. Resolved, that the following bills be paid: John Tyree. Windsor Trust Company. Union Trust Company of New York. N. B. Robertson. Western Union Telegraph Company. Postal Telegraph Company. Century Printing Company.

(Signed) JOHN JANNEY, Sec.

Resolutions Board of Directors—Tenabo Mining & Smelting Company.

December 6, 1911.

Resolved, that after the receipt of satisfactory se-

curity by this company, the following cablegram be sent Franco-American Bank, France.

Deliver to the order of Locker two blocks each of ten thousand (10,000) shares against payment of Fr. 15,000, each block send remittance immediately to cover remit by mail to-us-here exchange on New York.

Resolved, that the Franco-American Bank be and the same is hereby authorized and instructed to deliver to the order of Payton B. Locker the bearer certificates of stock in this company now in the possession of the said Franco-American Bank upon the payment to said bank for the credit of this company of the sum of seventy (70) francs for each certificate of ten (10) shares, which is at the rate of Fr. 7 per share.

(Signed) JOHN JANNEY, Sec.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated April 20, 1912.]

Minutes of Directors' Meeting.

The Board of Directors of the Tenabo Mining & Smelting Company, met at the office of Stephens, Smith & Porter in Salt Lake City, Utah, at Two o'clock P. M., on Saturday, the 20th day of April, 1912. Mr. Ferry acted as President of the meeting and Mr. Smith was elected acting Secretary of the meeting. There were present the following directors elected at the [176] annual meeting of the stockholders on the 11th day of March, 1912. W. Mont Ferry, E. O. Howard, John Pingree, Benner X. Smith.

John Janney being absent from the State. It was moved, seconded and adopted that the Board proceed to the election of officers. The following were nominated: W. Mont Ferry, President, John Pingree, Vice-president, E. O. Howard, Treasurer, and John Janney, Secretary.

There being no further nominations, a ballot was taken, which resulted in the election of said persons to said several offices. The following business was then transacted. Be it resolved, that the sum of $800.00 is hereby appropriated and set aside for the purpose of paying the necessary expenses of cross-cutting and developing the ore body in the Gem Mine, which cross-cutting and developing, is hereby ordered to be done under the direction of Secretary, John Janney, to be paid upon satisfactory evidence of the performance of the work and vouchers therefor. Upon the resolution being put to a vote, it was unanimously adopted.

Director Smith stated that the mortgage now upon the property held by Edith Sherman could be extended for another year, upon the payment of $250.00. He thereupon offered the following resolution: Be it resolved that there be paid upon the mortgage indebtedness held by Edith Sherman, the sum of $250.00, upon condition that said mortgage be extended one year. Said resolution being put to a vote, was unanimously adopted. It was moved, seconded and unanimously adopted, Director Smith being excused from voting, that there be paid to Stephens, Smith & Porter, attorneys for the company, the sum of $500.00 as a partial payment for

services rendered as attorneys. It was moved and seconded and unanimously adopted that H. C. Edwards, counsel for the company in the suit of equity now pending in Nevada, brought by one Bates against the company, be authorized to employ some competent counsel residing in Nevada to assist in the defense of said suit, at an expense to the company of not to exceed $100.00, which it is understood will not be paid until after the rendition of said services and when the company is in funds.

It was moved and seconded and unanimously adopted that the treasurer be directed to pay A. H. Raleigh, the balance due him for the performance of the assessment work upon the property, to wit, $171.40. [177]

There being no further business the meeting adjourned.

(Signed) BENNER X. SMITH,
Acting Secretary.

We, the undersigned directors, agree to and approve the foregoing minutes.

(Signed) JOHN PINGREE.
W. MONT FERRY.
BENNER X. SMITH.
E. O. HOWARD.

(The following constitute the record of the minutes of the Tenabo Mining & Smelting Co.)

[Defendant's Exhibit "L"—Notice of First Meeting of Incorporators and Stockholders of Tenabo M. & S. Co.]

Notice of the First Meeting of the Incorporators and Stockholders of the Tenabo Mining and Smelting Company, a Nevada Corporation.

Notice is hereby given, that the first meeting of the Tenabo Mining & Smelting Company will be held on the 6th day of January, A. D. 1909, at two P. M., of said day, at the office of C. S. Varian in suite 660–602 in the Utah Savings & Trust Building on Main Street in the City of Salt Lake, State of Utah, for the purpose following, that is to say:

1. To elect a Board of Directors for said corporation, consisting of five stockholders, and to provide for the tenure of office and compensation of said directors.

2. To provide for the compensation and the tenures of office of the officers corporation.

3. To designate and provide for a corporate seal.

4. To authorize and provide for the taking over from the Gem Consolidated Mining Company, a corporation, the Little Gem, Ollie, Winnemucca and Reno lode mining claims, and all other property and property interest of said Mining Company, situate in Bullion Mining District, Lander County, Nevada; and for the taking over from the Tenabo Consolidated Mines Company, a Nevada corporation, the Two Widows, Two Widows Extension, Copper Hill No. 1, Copper Hill No. 2, *Copper Hill No. 2,* Copper

Hill No. 3, and Copper Hill No. 4, lode mining claims; also, the controlling interest in the Nevada Phoenix Mining Company, a corporation, all situate in said mining district, county and State; all in consideration of the entire capital stock of the Tenabo Mining and Smelting Company.

5. To provide for issuance to the said Gem Consolidated Mining Company and to the said Tenabo Consolidated Mines Company of a portion of said stock and for the retention in the treasury of treasury stock.

6. To designate a transfer agent and registrar and in this behalf to [178] consider the advisability of appointing the Columbia Trust Company, and the Carnegie Trust Company, both of New York City, transfer agents and registrar respectively of the stock of the Tenabo Mining & Smelting Company.

7. To provide for and authorize the sale of treasury stock.

8. To adopt by-laws and transact all other business necessary and pertinent to the corporation affairs.

The subscribers hereto, being the incorporators and only stockholders of the corporation, do each waive further time or notice of said meeting.

Dated this 4th day of January, A. D. 1909.

(Signed) C. S. VARIAN.
R. T. BADGER.
H. P. CLARK.
H. C. EDWARDS.

[Defendant's Exhibit "L"—Minutes of Incorporators of Tenabo M. & S. Co., Dated January 6, 1909.]

Pages 2–3–4) MINUTES.

The incorporators of the Tenabo Mining and Smelting Company, incorporated under the laws of Nevada, pursuant to law and notice duly given, met on this the 6th day of January, A. D. 1909, at the office of C. S. Varian in suite 600–602, in Utah Savings & Trust Building on Main Street, in the city of Salt Lake, State of Utah: Present: H. P. Clark, R. T. Badger, C. S. Varian and H. C. Edwards. A telegram from incorporator Lester D. Freed, at Chicago, acknowledging service of notice and waiving time was read and filed. Whereupon, C. S. Varian was elected chairman and R. T. Badger was elected secretary of the meeting, and the following business was transacted. Mr. Edwards moved and Mr. Clark seconded the following resolution which was unanimously adopted:

Resolved, that the officers of this corporation, in addition to those provided for in the Articles of Incorporation, shall be a President, Vice-president and Secretary, who shall be stockholders and directors, and a Treasurer, and such other officers, attorneys and agents as the by-laws shall prescribe; the directors elected at this meeting shall respectively hold their offices for the period of two years from date hereof, and until their successors are elected and qualified, and the other officers, agents and attorneys shall hold their respective offices for terms as by the by-laws provided. The Directors shall receive as

compensation for their services each 2500 shares of the capital stock of the corporation, and shall be entitled to purchase—each 5000 shares of said stock at the price of 15¢ per [179] share at any time before the 25th day of November, 1909. The compensation, if any, of the secretary and other officers, attorneys or agents shall be fixed by the directors. Mr. Edwards moved, and Mr. Clark seconded, the following resolution, which was unanimously adopted: Resolved, that the corporate seal of this corporation be designated and provided for by the Board of Directors. Mr. Clark moved, and Mr. Edwards seconded, the following resolution, which was unanimously adopted: Resolved, that the Board of Directors do authorize and provide for the taking of a deed from the Board of Directors of the Gem Consolidated Mining Company of all the property belonging to said Company situate in Bullion Mining District, Lander County, Nevada, as described in and in accordance with the resolution by said Board of Directors of said Gem Consolidated Mining Company of the 25th day of November, A. D. 1908, and to issue to the said Gem Consolidated Mining Company and to deliver to its President and Secretary two certificates of the capital stock of this company, one for 400,000 shares and the other for 50,000 shares to be deposited in escrow with the Carnegie Trust Company of New York City to be held therein until the 25th day of November, 1909, as by said resolution on the 25th day of November, 1908, provided; and to authorize and provide for the taking of a deed from the Board of Directors of the Tenabo Consoli-

dated Mines Company of all of its property situate in Bullion Mining District, Lander County, Nevada, as authorized and provided by the resolution of the Board of Directors of said corporation on the 21st day of November, 1908; and to issue to said Tenabo Consolidated Mines Company and deliver to its President and Secretary two certificates of the capital stock of this company, one for 250,000 shares and the other for 50,000 shares to be deposited with the Carnegie Trust Company of New York City, and held in escrow by said Trust Company until the 25th day of November, 1909, in pursuance of and in accordance with the resolution of the said Tenabo Consolidated Mines Company as aforesaid.

Mr. Edwards moved and Mr. Clark seconded the following resolution, which was unanimously adopted: Resolved, that the Trustees of this company are authorized and directed to designate the Columbia Trust Company of New York City as the Transfer Agent of the stock of this corporation with necessary [180] powers to countersign the certificates of the original issue of stock and to designate the Carnegie Trust Company of New York City as Registrar of the stock of this corporation with authority to countersign the certificates of the original issue of said stock. Mr. Clark moved and Mr. Edwards seconded the following resolution, which was unanimously adopted: Resolved, that the Trustees are authorized to designate the treasury stock of this company and to authorize and provide for its sale.

Whereupon motion duly seconded and carried. A ballot was taken for the election of the trustees of

this corporation and upon count thereof it appeared that the following stockholders and incorporators were unanimously elected, to wit, H. P. Clark, R. T. Badger, H. C. Edwards, C. S. Varian, Lester D. Freed. There being no further business said meeting adjourned *sine die.*

We hereby certify that pursuant to notice a meeting of the incorporators of the Tenabo Mining & Smelting Company was held on the 6th day of January, A. D. 1909, at 2 o'clock P. M., of said day, at the office of C. S. Varian, in suits 600–602 Utah Savings & Trust Building, on Main Street, in the City of Salt Lake, State of Utah, and that the annexed notice with telegram from Lester D. Freed is the original notice of said meeting, and that the foregoing and annexed minutes thereof are the original minutes of the business transacted at said meeting.

(Signed) C. S. VARIAN, Chairman.
R. T. BADGER, Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated January 7, 1909.]

(Pages 5–6–7–8–9) MINUTES.

At a meeting of the Board of Directors of the Tenabo Mining & Smelting Company pursuant to call, held at the office of C. S. Varian, suits 600–602 Utah Savings & Trust Building, on Main Street, in the City of Salt Lake, State of Utah, on the 7th day of January, A. D. 1909, at 4 o'clock P. M., on said day. The said Directors severally took and subscribed to the oath of office prescribed by the laws of the State of Nevada. Present Directors: H. P.

Clark, R. T. Badger, C. S. Varian, H. C. Edwards. Whereupon the Board organized by the election of the following officers, to wit: H. P. Clark, President; H. C. Edwards, Vice-president; R. T. Badger, Secretary and Treasurer, with a monthly salary of fifty dollars [181] per month for each of said officers. A telegram from Director Freed waiving time and notice of this meeting was read and filed. When the following proceedings were had the President in the Chair: Mr. Edwards presented a draft of by-laws for this corporation and moved their adoption, and Mr. Varian seconded motion. Whereupon the said by-laws were considered, approved and adopted by an unanimous vote. It is moved by Mr. Edwards, and seconded by Mr. Badger, that C. S. Varian be appointed attorney for the company at a salary of fifty (50) dollars, payable monthly, to be in full for all services in the matter of advice, but not to include retainers or services in any litigation in which the company may be involved, which motion was carried. Mr. Edwards offered the following resolution: Whereas this corporation can secure a deed from the Gem Consolidated Mining Company, a Delaware corporation, to the location titles of the Little Gem, Ollie, Winnemucca and Reno lode mining claims, situate in the Bullion Mining District, Lander County, Nevada, and Whereas this corporation can secure from the Tenabo Consolidated Mines Company, a Nevada corporation, to the location titles of the Two Widows, Two Widows Extension, Copper Hill No. 1, Copper Hill No. 2, Copper Hill No. 3, and Copper Hill No. 4, lode mining claims, and the

Nevada Phoenix lease, all situate in the Bullion Mining District, Lander County, Nevada.

Now, therefore, be it resolved, that this corporation accept a bargain and sale deed from the Gem Consolidated Mining Company, a Delaware corporation, and from the Tenabo Consolidated Mines Company, a Nevada corporation, to all of the above-described property in full payment for its entire capital stock, which said capital stock is hereby declared to be fully paid up, that is to say, that the conveyance of the title to said property to this corporation is accepted as payment in full at the par value for all of the stock of said corporation including the 750,000 shares of stock remaining in the treasury of this corporation.

Said resolution was seconded by Mr. Badger and being put to a vote was unanimously adopted. Mr. Edwards offered the following resolution: Whereas the Board of Directors of the Gem Consolidated Mining Company did on the 23rd day of November, 1908, authorize the execution of a deed of all of its property mentioned above situate in Bullion Mining District Lander County, [182] Nevada, to this corporation and agreed to accept 450,000 shares of the capital stock of this corporation to be set aside for distribution among its stockholders on the 25th day of November, 1909, and agreeing further that there should remain in the treasury of the Tenabo Mining & Smelting Company, 750,000 shares of its capital stock, and

Whereas the Tenabo Consolidated Mines Company, a Nevada corporation, at a meeting of its Board of

Directors, held November 21st, 1908, agreed and authorized the execution of a deed of all its property and property interests in the Bullion Mining District, Lander County, Nevada, including the location title of the Two Widows, Two Widows' Extension, Copper Hill No. 1, Copper Hill No. 2, Copper Hill No. 3, and Copper Hill No. 4, lode mining claims, and the property known as the Nevada Phoenix Lease, to this corporation and accept therefor 300,000 shares of the capital stock of this corporation to be set aside for distribution among its stockholders on the 25th day of November, 1909, expressly providing and agreeing that 750,000 shares of the capital stock of the Tenabo Mining & Smelting Company should remain in its treasury, and

Whereas, further, it was agreed, provided and authorized by the Board of Directors of the Gem Consolidated Mining Company at its meeting held on the 25th day of November, 1908, that the 450,000 shares of the capital stock of this corporation which is to be received by it should be deposited by its president and secretary with the Carnegie Trust Company of New York City, and held by said Trust Company, until the 25th day of November, 1909, before distribution of the same to its stockholders, and

Whereas, the Tenabo Consolidated Mines Company at a meeting of its Board of Directors held on the 21st day of November, 1908, did provide and authorize that 300,000 shares of the capital stock of this corporation, which is to be received by it, should be deposited by its president and secretary with the Carnegie Trust Company and held by said Trust

Company until the 25th day of November, 1909, before distribution of the same to its stockholders. Now, therefore, be it resolved that the president and secretary of this corporation are hereby authorized, instructed and directed to issue to the Gem Consolidated Mining Company two certificates of stock, one for [183] 400,000 shares and the other for 50,000 and deliver the same to the President and Secretary of the Gem Consolidated Mining Company to be deposited by them with the Carnegie Trust Company of New York City, and held in escrow with said Trust Company until the 25th day of November, 1909, as provided, and agreed and be it further resolved that the president and secretary of this corporation are hereby authorized, instructed and directed to issue two certificates of stock, one for 250,000 shares and the other for 50,000 to the Tenabo Consolidated Mines Company and deliver the same to its president and secretary to be deposited by them with the Carnegie Trust Company of New York City, and held in escrow with said Trust Company until the 25th day of November, 1909, as provided and agreed, and

Be it further resolved that the secretary of this corporation is instructed to deliver said stock as soon as it can be issued and take proper receipts therefor. Said resolution was seconded by Mr. Varian and being put to a vote was unanimously adopted. Mr. Edwards offered the following resolution:

"Resolved that the Columbia Trust Company, of New York City, be and hereby is appointed Transfer Agent of the stock of this corporation, and be it fur-

ther resolved that the said Trust Company is hereby authorized to countersign, when signed by the president or vice-president and the secretary or assistant secretary of this company, an original issue of the capital stock to the number of 1,500,000 shares of the par value of $2.00 each."

Be it further resolved, that the said Trust Company may apply to and act upon instructions of C. S. Varian, counsel for this corporation, in respect to any legal questions arising in connection with said agency, and be it further resolved, that the secretary be and is hereby instructed to file with the said Columbia Trust Company a certified copy of the foregoing resolution." Mr. Badger seconded the resolution, and upon being put to a vote was unanimously adopted. Mr. Edwards offered the following resolution: Resolved that the Carnegie Trust Company of New York be and is hereby appointed Registrar of the stock of this corporation, and resolved, further, that said Trust Company is authorized to countersign, when signed by the president or vice-president and secretary or assistant secretary of this company, an original issue of the capital stock to the number of 1,500,000 shares, of the par value of $2.00 each, and [184]

Be it further resolved that the said Trust Company may apply to and act upon instructions of C. S. Varian, counsel for this corporation, in respect to any legal questions arising in connection with said agency, and

Be it further resolved that the secretary be and is hereby instructed to file with the said Carnegie Trust

Company a certified copy of the foregoing resolutions." Mr. Badger seconded the resolution, and upon being put to a vote, was unanimously adopted. Mr. Edwards offered the following resolution: Whereas, negotiations have been pending with brokers of New York City and Boston wherein it appears that a sale of 600,000 shares of the treasury stock of this corporation can be made, and whereas, it is the opinion of this Board of Directors that it is to the best interests of this corporation to grant an option for the sale of 600,000 shares of the treasury stock of this corporation to P. B. Locker of Salt Lake City, Utah, with full power to assign to others that he may desire;

Now, therefore, be it resolved, that this corporation do grant an option to the said P. B. Locker, or assigns, to purchase 600,000 shares of the treasury stock of this corporation, at the price of 15 cents per share for the first 400,000 shares and 20 cents per share for the remaining 200,000 shares, making a total of $100,000, for 600,000 shares of the treasury stock, payable as follows: The sum of twenty thousand ($20,000) dollars to be paid to this corporation on or before the tenth day of April, 1909, and the further sum of Five Thousand ($5,000) Dollars on the first days of the months May and June of said year, and the sum of Ten Thousand ($10,000) Dollars per month on the first days of July, August, and September, and Twenty Thousand ($20,000) Dollars per month on the first days of October and November, 1909, making the full sum of One Hundred Thousand ($100,000) Dollars.

Said contract to provide that time is the essence of the same, and in the event of said Locker, or his assigns, fail to make any of said payments, as therein provided, then said option will immediately cease and terminate, and the said Locker, or his assigns, to lose all rights to purchase said stock under the provisions of said option; *Provided,* however, that the said Locker nor his assigns, nor either of them shall incur any indebtedness or liability of any kind against this company or its property.

Provided, however, the Board may extend time of payments if it so desires, [185] and the president and secretary of this corporation are authorized and directed to execute immediately on behalf of this corporation such contract as will carry this resolution into full force and effect, said contract to provide that the said Locker, or his assigns, is to cause a market to be made upon the "Curb" of New York City and elsewhere, as may seem best, giving market quotations of the stock of this corporation, and the said contract to provide further that the stock books of this corporation shall be signed by the president and the secretary, and forwarded to the Carnegie Trust Company of New York City, with instructions to deliver treasury stock to the order of said Locker, or his assigns, in such amounts as may be called for, upon the payment to the said Carnegie Trust Company of the sum of 15 cents per share for the first 400,000 shares, and 20 cents per share for the last 200,000 shares of the 600,000 shares covered by this option, the same to be placed to the credit of this corporation for its use and benefit."

Said resolution was seconded by Mr. Badger and being put to a vote was unanimously adopted. Mr. Edwards informed the Board that Mr. C. C. Wylie has withdrawn any objection to the making of the contract provided for in the foregoing resolution. Mr. Varian offered the following resolution: Whereas, the Reliance Mining & Milling Company has offered to sell to this corporation four mining claims lying on Indian Creek in the Bullion Mining District, Lander County, Nevada, described as follows: Reliance No. 1; Reliance No. 2; Reliance No. 3; and Reliance No. 4.

Whereas, the said mining claims will be of value to this corporation by reason of the water flowing through the same and for a probable millsite: Therefore, be it resolved that this corporation do accept the deed and transfer to the said claims for the Reliance Mining & Milling Company and will pay the sum of Four Hundred Fifty ($450.00) Dollars for the same. This amount to pay in full for the assessment work for the year 1908 and the survey of the same. Motion was seconded by Mr. Edwards and was unanimously adopted. Adjourned to meet at call of Chairman.

(Signed) R. T. BADGER,
Secretary. [186]

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated March 22, 1909.]

(Pages 10–11) MINUTES.

At a meeting of the Board of Directors of the Tenabo Mining & Smelting Company, regularly

called pursuant to notice and held on the 22nd day of March, A. D. 1909, at the office of the company in the City of Salt Lake, Utah, there were present: H. P. Clark, President; R. T. Badger, Secretary; C. S. Varian and Lester D. Freed.

Whereupon, it appearing that the Columbia Trust Company of New York City, heretofore, on the 7th day of January, A. D. 1909, appointed as Transfer Agent of the stock of this corporation, is unable to act, and that the Carnegie Trust Company of New York City, heretofore, on said day, appointed Registrar of the stock of this corporation, is also unable to act; and the Tenabo Consolidated Mines Company a corporation, by its President, and the Gem Consolidated Mining Company, a corporation, by its President, having respectively requested this corporation to appoint the Windsor Trust Company of New York City as Transfer Agent, and the Union Trust Company of New York City, as Registrar, respectively, of the stock of this corporation; and it appearing to this Board that such appointments are proper and necessary to be made, the following resolution was unanimously adopted:

Resolved, that the appointment of the Columbia Trust Company of New York City, as Transfer Agent of the stock of this corporation, made on January 7th, A. D. 1909, is hereby revoked; and

Resolved, that the Windsor Trust Company of New York City, be and hereby is appointed Transfer Agent of the stock of this corporation, and

Resolved, that the said Trust Company is hereby authorized to countersign when signed by the Presi-

dent, or Vice-president, and the Secretary of this company an original issue of the capital stock of this corporation to the number of 1,500,000 shares of the par value of $2.00 each, and

Resolved, that the secretary be and hereby is instructed to file with the said Windsor Trust Company a certified copy of the foregoing resolution, and

Resolved, that the appointment by this Board of the Carnegie Trust Company of New York City, made on January 7th, A. D. 1909, is hereby revoked, and the said Carnegie Trust Company is hereby authorized and requested to deliver to R. T. Badger, the secretary of this corporation, or upon his [187] order, the book of stock certificates and common seal belonging to this corporation, and

Resolved, that the Union Trust Company of New York City be and hereby is appointed Registrar of the stock of this corporation; and said Trust Company is hereby authorized to countersign, when signed by the President, or Vice-president, and the Secretary of this company, an original issue of the capital stock of this corporation to the number of 1,500,000 shares of the par value of $2.00 each; and

Resolved, that the Secretary be and is hereby instructed to file with the said Union Trust Company a certified copy of the foregoing resolutions.

(Signed) R. T. BADGER, Secretary.

I hereby ratify the foregoing acts of the Board of Directors and adopt the same with same force as though I had been present at said meeting, and participated therein.

(Signed) H. C. EDWARDS.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated May 6, 1909.]

(Page 12) MINUTES.

Minutes of Directors' Meeting of Tenabo Mining & Smelting Company held pursuant to due notice, May 6th, 1909. Present: H. P. Clark, H. C. Edwards, C. S. Varian, R. T. Badger. The Board considered letter written by Mr. Hiram Tyree, requesting them to order the Windsor Trust Company to deliver the Gem Mining Company stock to the Astor Trust Company. After considerable discussion, it was decided that before doing so, this Board should have the unanimous consent of all parties interested in the original transaction.

The question of payment of $200.00 to Mr. McCornick, and $75.00 due Mr. Edwards by Hiram Tyree. It was unanimously decided that this company does not recognize any such claims, as all properties were supposed to come to the new corporation clear of debt. Regarding suit by Lloyd Seaman against the company, it was moved by Mr. Edwards that the general counsel of the company be authorized to incur any expense deemed necessary by him in protecting the company in suit of Lloyd Seaman vs. Gem Consolidated Mining Co., seconded by Mr. Varian, and carried. It was moved by Mr. Varian that the treasurer be authorized to pay 1908 taxes and costs on the Gem and Phoenix [188] Mining Claims, as indicated by letter from the Treasurer of Lander County, Nevada, same to be charged against

commissions to Locker. The following resolution was unanimously passed: Whereas, the original assignment of one-third interest of contract by Locker to Hiram Tyree, dated January 8th, 1908, has been presented to the Board, and a true copy thereof filed with the Secretary, the Secretary is hereby directed to notify Mr. Locker of the fact. There being no further business the meeting adjourned.

(Signed) R. T. BADGER,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated August 5, 1909.]

MINUTES.

Minutes of Meeting of Tenabo Mining & Smelting Co., held pursuant to due notice, August 5th, 1909. Present: H. C. Edwards, H. P. Clark, C. S. Varian and R. T. Badger. A letter from Mr. Hiram Tyree making demands as follows, was read to the Board:

1. "I want the Board to say that they will order the Windsor Trust Company to issue and deliver treasury stock up to the amount of 150,000 shares, upon the payment to the Windsor Trust Company of 15¢ per share.

2. "I want the Board to direct the Windsor Trust Company to deliver to the order of the Gem Consolidated Mining Company the fifty thousand share certificate, now in its possession.

3. "I want the Secretary of the Board to sign the blanks presented for a public statement in listing the stock." On motion of Mr. Varian, seconded by Mr. Badger, all said demands were denied, the vote

being as follows: Ay's—C. S. Varian, R. T. Badger and H. P. Clark. H. C. Edwards not voting.

On motion, the Secretary was authorized to wire P. B. Locker that the listing on the New York Curb was not authorized by the Board. On motion, the meeting adjourned.

(Signed) R. T. BADGER,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated October 2, 1909.]

MINUTES.

At a meeting of the Board of Directors of the Tenabo Mining & Smelting Co., at its office at rooms 600–602 in the Utah Savings & Trust Company's Building in the City of Salt Lake, on the 2nd day of October, 1909, held pursuant to call, there were present: H. P. Clark, President; R. T. Badger, Secretary; Lester D. Freed, H. C. Edwards and C. S. Varian, Directors. [189]

Upon motion of director Edwards, seconded by Director Freed, the following resolution was unanimously adopted: Whereas, an option contract for the sale of 600,000 shares of the treasury stock of this company by P. B. Locker, was made by and between this company and the said Locker, on the 14th day of Jan., 1909; and

Whereas, the said contract was not complied with, nor fulfilled by the said Locker, and was cancelled by resolution of this Board taking effect on the 15th day of July, A. D. 1909, and due notice thereof in writing given to said Locker and Hiram Tyree and J. W.

Janney, assignees of an interest in said contract; and Whereas, by resolution adopted by the Board on the 19th day of July, A. D. 1909, the said Locker and the said Janney were appointed the agents of this company with authority to sell for cash at not less than fifty cents per share, the remainder of the treasury stock of this company, yet unsold of the block of 600,000 shares, authorized to be sold by the aforesaid contract of January 14th, A. D. 1909, and Whereas, it was, by said last mentioned resolution, provided that the authority thereby conferred upon said Locker and said Janney should terminate and be considered revoked without further action of this Board, upon the expiration of sixty days, from the said 19th day of July, A. D. 1909; and Whereas, an indebtedness of approximately $20,000.00 (including interest), charged against the "Gem," "Reno," "Ollie," and "Winnemucca" mining claims, the property of this company, by mortgage in favor of W. S. McCornick, is past due, and in suit for foreclosure, in the District Court for Lander County, State of Nevada; and Whereas, a suit is also pending in said court for the foreclosure of a miner's or laborer's lien filed against the said last-above named property to recover the sum of $2,779.00 with $500.00 attorney's fees, interest and costs; and Whereas, the annual work to be done upon the fourteen mining claims, the property of this company, has not been done for the current year, and must be done by and before the first day of January, A. D. 1910, and the sum of $1,600.00 is required for the performance and superintendence of said work; and Whereas, this company has no

money for the satisfaction of the aforesaid claims and charges, or for such part thereof as may be found to be justly chargeable against the company's property, it is necessary that the company should have immediately the sum of $25,000.00 for the purposes aforesaid and [190] its necessary expenses and charges; and Whereas, the company has no other means whereby to procure said or any sum of money other than by the sale of its treasury stock; Now, Therefore, be it resolved: That this company offers for sale and will sell, for the sum of $25,000.00 in cash, so much of its treasury stock yet unsold as may be necessary to procure said sum at once, and hereby invites bids from responsible persons for the same; provided, nevertheless, that no stock shall be sold, issued or delivered until and unless the amount of money to be paid to this company for the entire number of shares hereby authorized to be sold, shall aggregate the full sum of $25,000; the intention being to sell no more of the treasury stock, unless enough shares can be sold to net the company said sum.

And the secretary is directed to forward certified copies of this resolution to the Windsor Trust Company, P. B. Locker, J. W. Janney and Hiram Tyree. Approved.

(Signed) C. S. VARIAN.
H. P. CLARK.
LESTER D. FREED.
H. C. EDWARDS.
R. T. BADGER.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated October 8, 1909.]

MINUTES.

Directors' Meeting of the Tenabo Mining & Smelting Company held pursuant to call, October 8th, 1909, at nine A. M., at the office of the company. Present: Directors Clerk, President; Badger, Secretary; Edwards and Varian, whereupon the following business was transacted. Upon motion of Mr. Varian, seconded by Mr. Edwards, the following resolution was unanimously adopted:

Resolved, that the secretary is hereby directed to forthwith file for record and have recorded in the office of the County Recorder of Lander County, Nevada, all the deeds of title to the several properties of this company. Whereupon it was moved by Mr. Badger and seconded by Mr. Edwards that the following resolution be adopted: Resolved that this company will receive and consider bids for the purchase of all or any of its treasury stock yet unsold, including stock offered for sale in accordance with the terms of the resolution of this Board adopted Saturday, October 2nd, 1909, which shall be submitted before November 25th, 1909. This limitation of time is made because of the contract and pool agreement made by and between this company and the Gem and Tenabo Mining Companies providing that no stock shall be released **[191]** and delivered to purchasers before said date, notice of which agreement and the terms thereof being duly given to and

accepted by the Windsor Trust Company of New York.

In place of stock sold receipts therefor by this company will be issued by the Trust Company. On motion, the meeting adjourned.

(Signed) R. T. BADGER,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated October 28, 1909.]

MINUTES.

At a meeting of the Directors of the Tenabo Mining & Smelting Company, held pursuant to call at the office of the company in Salt Lake City, on the 28th day of October, A. D. 1909, at five o'clock P. M. of said day, there were present: Directors H. P. Clark, H. C. Edwards, Lester Freed and C. S. Varian, President Clark in the chair. The following business was transacted:

Upon motion of Director Edwards, seconded by Director Freed the following resolution was unanimously adopted: Resolved, that this company does hereby agree to sell to a purchaser, represented by the brokerage firm of McCornick Brothers of New York City, a block of one hundred and sixty-five thousand (165,000) shares of its treasury stock for the lump sum in cash of Twenty-five thousand ($25,000) Dollars, upon the condition, nevertheless, that said number of shares of treasury stock is sold in its entirety for the said sum of twenty-five thousand ($25,000) Dollars to be paid to the Windsor Trust Company for payment to this company at the

time of the delivery of said stock. The said Windsor Trust Company is hereby authorized and directed, upon payment to it of said sum of twenty-five thousand ($25,000) dollars in one payment and at one time, to forthwith deliver to the said McCornick Brothers, or to their order, one hundred and sixty-five thousand (165,000) shares of the treasury stock of this company. And the secretary of this company is directed to forthwith make and forward certified copies of this resolution to the said Windsor Trust Company and the said McCornick Brothers of New York City.

I hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Directors of the Tenabo Mining & Smelting Company on the 28th day of October, A. D. 1909. **[192]**

Witness my hand and the corporate seal of said company this 29th day of October, A. D. 1909.

(Signed) R. T. BADGER,
Secretary.

Approved by: Clark, Edwards, Freed, Varian. 10/29/09.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated November 18, 1909.]

MINUTES.

The Board of Directors of the Tenabo Mining & Smelting Company met this 18th day of November, 1909, at the office of the company in Salt Lake City, pursuant to call. Present: H. P. Clark, President and Director; H. C. Edwards, Lester D. Freed and

C. S. Varian, Directors. Whereupon the following resolutions were unanimously adopted: Whereas it is unofficially reported to this Board that one hundred sixty-five thousand (165,000) shares of the treasury stock of this company has been sold for the sum of twenty-five thousand ($25,000) dollars, and that said sum has been paid unto the Windsor Trust Company of New York for the use of this company, and Whereas, this company is indebted to the said Windsor Trust Company for certain charges and expenses; therefore be it Resolved, that the Windsor Trust Company of New York forthwith remit to this company the balance of said twenty-five thousand ($25,000) dollars after paying to itself its own proper charges and expenses in the premises.

Whereas, the Gem Consolidated Mining Company is entitled to the present use of fifty thousand (50,000) shares of the capital stock of this company now deposited with the Windsor Trust Company of New York, therefore, be it Resolved, that the said Windsor Trust Company is hereby authorized and directed to deliver fifty thousand (50,000) shares of said stock unto the Board of Directors of the said Gem Consolidated Mining Company, or to its order, taking proper receipt and voucher therefor. Whereas, the Gem Consolidated Mining Company did by deed of bargain and sale, on or about the 14th day of January, 1909, in consideration of four hundred fifty thousand (450,000) shares of the capital stock of this company, convey unto this company the Little Gem, Ollie, Winnemucca, and Reno Mining Claims, situate in Bullion Mining District, Lander County, Nevada;

and Whereas, by the laws of *the* Nevada the words "Grant, bargain and sale," employed in said conveyance are express covenants that said mining claims were, at the time of the [193] execution and delivery of said deed, free from encumbrances done, made or suffered by the said Gem Consolidated Mining Company; and Whereas, at the time of the execution and delivery of the deed aforesaid, the said mining claims thereby conveyed were and still are encumbered by a miner's lien filed in October, 1908, by one Lloyd Seaman for two thousand seven hundred seventy-nine ($2,779.00) dollars and costs, and suit is now pending to foreclose said lien and recover in addition five hundred ($500.00) dollars as attorney's fees, besides costs, in the District Court of the Third Judicial District of Nevada, County of Lander; therefore, be it,

Resolved, that this company do withhold fifty thousand (50,000) shares of its capital stock heretofore deposited with the Windsor Trust Company of New York for the use and benefit of the Gem Consolidated Mining Company, being a part of the block of four hundred thousand (400,000) shares to be delivered to the Gem Consolidated Mining Company on November 25th, 1909, until the said suit and the lien aforesaid are fully satisfied, paid or discharged; and the said Windsor Trust Company is hereby charged to withhold from delivery fifty thousand (50,000) shares of the said stock until a further direction by this corporation; and be it Resolved, that the said Windsor Trust Company is hereby further authorized and directed to deliver to the President

and Secretary of the Gem Consolidated Mining Company, on November 25th, 1909, three hundred fifty thousand (350,000) shares of the capital stock of this company; and be it further Resolved, that the said Windsor Trust Company is hereby authorized and directed to deliver unto the President and Secretary of the Tenabo Consolidated Mines Company, on November 25th, 1909, three hundred thousand (300,000) shares of the capital stock of this company, heretofore deposited for the purpose, taking proper receipt and vouchers therefor. Resolved, that the secretary of this company do forthwith send to the Windsor Trust Company and to the President of the Gem Consolidated Mining Company and Tenabo Consolidated Mines Company, respectively, duly certified copies of the foregoing resolutions. Resolved, that the secretary or treasurer of this company upon receipt of any money from the Windsor Trust Company, do forthwith deposit the same in the Utah National Bank of this City, to be drawn out only upon checks signed by the President and **[194]** Secretary.

(Signed) R. T. BADGER,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated December 7, 1909.]

MINUTES.

The Board met pursuant to call at the company's office in Salt Lake on this the 7th day of December, 1909, at four o'clock P. M. Present; H. P. Clark, President, R. T. Badger, Secretary; H. C. Edwards

and C. S. Varian, Directors.

Mr. Janney presented a bill for expenses aggregating in the sum of $2,082.75. Upon a consideration it was ordered that the charge of $1,800.00 made for office rent and expenses of Locker & Jannay for the year ending December 31st, 1909, and the charge for a city directory of $6.00 be denied as not proper charges against this company; and that the charges for stock certificates of $105.00, and for corporate seal of $2.50 be denied, the same having been heretofore paid by this company.

It was further ordered that the secretary be instructed to ascertain who paid or furnished the money for the payment of the fees for incorporation of this company, to wit: State fee, $150.00, County Clerk's fee, $6.00, in all $156.00, and to pay said sum to the person entitled thereto. It was further ordered that the secretary ascertain whether the bills of Kelly & Company and the Grocer Printing Company for stock ledgers $6.00, and letter heads and envelopes $7.25 have been paid, and if so by whom, and that he pay the amounts as above to the proper person. It was further ordered that the President refer the charge made for labor and superintendence in the aggregate sum of $219.00 for account of A. E. Raleigh, John Tyree, Ray Kaller and Forest Keller to Mr. Weston with instructions to investigate the same and report at once whether the work was in the nature of assessment work or if not, what it was for and the necessity therefor. A letter to the secretary of this company from Mr. Hiram Tyree under date of November 28th, 1908,

enclosing a "LISTING APPLICATION FOR THE BOSTON CRUB" with request for its verification and exception by the secretary in order that Mr. Tyree could list the stock of the company, as in said application stated, was presented and read to the Board. Whereupon the following resolution was unanimously adopted. Resolved, that it appearing that the title to some of the mining claims belonging to this company is encumbered and clouded by deeds [195] to one Gallagher, former secretary of the Gem Consolidated Mining Company, and further by a suit to foreclose the lien of one Lloyd Seaman now pending in the State Court of Nevada for Lander County; and Whereas, the Board of Directors does not deem it wise or justifiable to make any further disposition of the stock of this company until the titles to its property have been cleared in the premises, the request of Mr. Tyree is denied, and the secretary instructed to take no action in the matter. It was further ordered that the attorney for the company be directed to inform Mr. Tyree of the action of the Board. Whereupon the meeting adjourned subject to call.

(Signed) R. T. BADGER,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated December 29, 1909.]

The Board of Directors met at the office of the company at Salt Lake City pursuant to call on this the 29th day of December, 1909. Present: H. P. Clark, President; R. T. Badger, Secretary and C. S. Varian,

Director. The attorney for the company reported that he had obtained from escrow in McConick's Bank the title deeds of this company. Upon motion, it was ordered that the secretary do send all of the title deeds and patent to the Recorder of Lander County, Nevada, for record, and that he also procure abstract of title to be written up to date. It appearing that it is desirable to list the stock of this company upon the Boston Curb—upon motion it was ordered that the secretary make and verify the necessary statement for that purpose in accordance with the statement approved by the Board at this meeting. Upon motion it was ordered that the salaries of the secretary and attorney be paid for the current month, and that the secretary do pay McCornick & Co., $75.00 on account of attorney's lien on papers in escrow in favor of E. B. Critchlow. It appearing that the deed from the Tenabo Consolidated Mines Company to this company misdescribed the "Widow" claim as the "Two Widows" claim, the attorney of this company is directed to prepare a deed correcting same and procure execution thereof by the Tenabo Consolidated Mines Company. There being no further business the meeting adjourned.

(Signed) R. T. BADGER,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated February 4, 1910.]

Salt Lake City, February 4, 1910.

Minutes of Director's Meeting of Tenabo Mining and Smelting Company held this day pursuant to due

notice. Present: Messrs. Clark, Varian, Edwards **[196]** and Badger. Mr. Varian reported that suit of Lloyd Seaman vs. Gem Consolidated Mining Company in Nevada would be continued for the term as per letter from plaintiff's counsel. Mr. Varian also reported letter to him from C. E. Kelly, attorney for Gem Consolidated Mining Company, requesting certain information. Upon motion laid upon table Mr. Varian then offered the following resolution: Whereas, there has been issued and sold about 920,000 shares of the capital stock of this company and there remains but about 580,000 shares; and Whereas, the capital stock of this company is non-assessable and the remaining 520,000 shares of the capital is the only resource left to the company and its stockholders for the purpose of developing its property; and Whereas, the members of this Board have no funds or other resources of the company, as except above; Now, Therefore, be it resolved that in the judgment of this Board of Directors they are not justified in making any further contracts for the sale of any part of the stock aforesaid, or in selling the same in any sum under the par value thereof, except in such quantities as shall be imperatively necessary to provide funds for the protection of the property of the company. Meeting adjourned until February 5th, at 12:00 o'clock noon without taking action on above resolution.

(Signed) R. T. BADGER,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated February 5, 1910.]

Salt Lake City, February 5th, 1910.

Minutes of Directors' meeting of Tenabo Mining & Smelting Company held at 12:00 o'clock noon, pursuant to adjournment of meeting of February 4, 1910. Present: Messrs. Clark, Varian, Edwards, Freed and Badger. Moved by Mr. Freed, seconded by Mr. Edwards that Windsor Trust be instructed to forward 2,000 shares of stock in the name of W. S. McCornick. That same be tendered to Mr. McCornick and that check for $1,000.00 signed by Mr. McCornick, now held by Mr. Badger, be handed to President Clark and by him presented for payment. Carried. Mr. Locker presented a contract for purchase of treasury stock. Mr. Varian moved to reject the same, seconded by Mr. Badger. As a substitute, Mr. Edwards moved to lay Locker contract on the table. Seconded by Mr. Freed. Substitute motion carried by following vote. Yeas: Freed, Edwards, Clark. Nays: Varian and Badger. Resolution of Mr. Varian set forth in minutes of February 4th, on being put to motion was unanimously **[197]** adopted. Moved by Mr. Edwards that it be unanimous sense of this meeting that no other business shall be transacted by this Board other than such as may be deemed necessary to preserve the property and property interests of this company and such formal action on other matters as may be deemed

proper by the Board to protect the interest of this corporation. Seconded by Varian and carried unanimously. Moved by Mr. Edwards: *That is* the desire of each and every member of this Board to be relieved as Directors and Officers of this company, and that the Windsor Trust be requested to furnish to the Board a list of stockholders of the company, and that secretary be directed to make such request of Trust Company over seal of company. Seconded by Mr. Freed, carried unanimously. On motion, meeting adjourned until 5:00 o'clock P. M.

(Signed) R. T. BADGER,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated February 5, 1910.]

Salt Lake City, February 5, 1910.

Minutes of Directors' meeting of Tenabo Mining & Smelting Company held at 5:00 P. M. pursuant to adjournment of previous meeting. Present: Messrs. Clark, Varian, Edwards, Freed and Badger. Resignation of Director H. C. Edwards presented and on motion, accepted. Mr. John Janney was elected to fill vacancy. Resignation of Director C. S. Varian was presented, and on motion, accepted. Mr. Benner X. Smith was elected to fill vacancy. Resignation of Director H. P. Clark presented, and on motion, was accepted. Mr. E. C. Howard was elected to fill vacancy. Resignation of Director Lester D. Freed was presented, and on motion was accepted. Mr. W. Mont. Ferry was elected to fill

vacancy. Resignation of Director R. T. Badger was presented, and on motion, was accepted. Mr. John Pingree was elected to fill vacancy. There being no further business, meeting adjourned.

(Signed) R. T. BADGER,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated February 5, 1910.]

Salt Lake City, February 5, 1910.

Minutes of Directors' meeting of Tenabo Mining & Smelting Company held at 5:00 P. M. pursuant to adjournment of previous meeting: Present: Messrs. Clark, Varian, Edwards, Freed and Badger. Resignation of Director H. C. Edwards presented and on motion accepted. Mr. John Janney was elected to fill vacancy, and after exhibiting certificate No. 1033, showing him to be **[198]** the holder of 100 shares of stock, Mr. Janney took and subscribed to the oath of office prescribed by law. Resignation of Director C. S. Varian was presented, and on motion, was accepted. Mr. Benner X. Smith was elected to fill vacancy, and after exhibiting certificate No. 1029, showing him to be the holder of 100 shares of stock, Mr. Smith took and subscribed to the oath of office prescribed by law. Resignation of Director H. P. Clark was presented, and on motion, was accepted. Mr. E. O. Howard was elected to fill vacancy, and after exhibiting certificate No. 1030, showing him to be the holder of 100 shares of stock, Mr. Howard took and subscribed to the oath of office prescribed

by law. Resignation of Director Lester D. Freed was presented, and on motion was accepted. Mr. W. Mont Ferry was elected to fill vacancy and after exhibiting certificate No. 1031, showing him to be the holder of 100 shares of stock, Mr. Ferry took and subscribed to the oath of office prescribed by law. Resignation of Director R. T. Badger was presented, and on motion was accepted. Mr. John Pingree was elected to fill vacancy, and after exhibiting certificate No. 1032 showing him to be the holder of 100 shares of stock, Mr. Pingree took and subscribed to the oath of office prescribed by law. There being no further business, meeting adjourned.

(Signed) R. T. BADGER,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated March 17, 1910.]

Salt Lake City, Utah, March 17, 1910.

Minutes of a meeting of the Board of Directors of the Tenabo Mining & Smelting Company. Pursuant to waiver of notice the Board of Directors of the Tenabo Mining & Smelting Company met at its place of business in Salt Lake City, Utah, at 11:30 o'clock A. M., on March 17, 1910. There were present H. P. Clark, R. T. Badger, Lester D. Freed and John Janney, being all of the Directors of said company. The secretary presented the waiver of notice pursuant to which the meeting was held. It was ordered to be entered at length in the minutes and is as follows:

The undersigned, being all of the Directors of the Tenabo Mining & Smelting Company, hereby call a meeting of the Board to be held at the office of the company, Salt Lake City, Utah, on the 17th day of March, 1910, at 11:30 o'clock, for the transaction of such business as may come before said meeting, and we hereby waive all requirements as to notice of such meeting. H. P. Clark. R. T. Badger. Lester D. Freed. John Janney.

President Clark called the meeting to order. The Board then took up the [199] business of filling the vacancy caused by the resignation of Director C. S. Varian, which resignation was accepted at a former meeting of the Board. Director Badger nominated Benner X. Smith to fill said vacancy on the Board. The nomination was seconded by Director Freed. There being no further nominations a ballot was taken resulting in the election of Mr. Smith by unanimous vote. Mr. Smith, being the owner of at least 100 shares of the capital stock, as shown by the books of the company, was declared by the President elected to said office of Director. He then duly qualified by taking and subscribing to the oath of office and then took part in the further proceedings of the Board. Director Freed then presented his resignation, which, upon motion, was accepted by the unanimous vote of the Board. Director Smith nominated E. O. Howard to fill the vacancy on the Board caused by the resignation of Director Freed. The nomination was seconded by Director Badger and there being no further nomination, a ballot was taken resulting in the election

of Mr. Howard by unanimous vote. Mr. Howard, being the owner of at least 100 shares of the capital stock, as shown by the books of the company, was declared by the President elected to the office of Director. Mr. Howard then duly qualified by taking and subscribing to the oath of office and then took part in the further proceedings of the Board.

Whereupon Director Badger resigned his office, which resignation was accepted by the unanimous vote of the Board. Director Smith nominated W. Mont Ferry to fill the vacancy on the Board caused by the resignation of Director Badger. The nomination was seconded by Director Howard. There being no further nomination, a ballot was taken resulting in the election of Mr. Ferry by unanimous vote. Mr. Ferry being the owner of at least 100 shares of the capital stock, as shown by the books of the company, was declared by the President elected to the office of Director. He then duly qualified by taking and subscribing to the oath of office. Director Clark then tendered his resignation, which was accepted by a unanimous vote of the Board, Director Smith was made temporary chairman to succeed President Clark. Thereupon Director Howard nominated John Pingree to fill the vacancy caused by the resignation of Director Clark. The nomination was seconded by Director Smith. There being no further nominations, a ballot was taken resulting in the election of Mr. Pingree by unanimous vote. Mr. Pingree, being the owner **[200]** of at least 100 shares of the capital stock, as shown by the

books of the company, was declared by the chairman elected to said office of Director. He then duly qualified by taking and subscribing to the oath of office.

There being no further business the meeting adjourned until Friday, the 18th day of March, 1910, at 11 o'clock A. M., of said day.

(Signed) H. P. CLARK,
President.
R. T. BADGER,
Secretary.
BENNER X. SMITH,
Chairman.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated March 5, 1910.]

Minutes of a Meeting of the Board of Directors of the Tenabo Mining & Smelting Company.

Salt Lake City, Utah, March 5, 1910.

Pursuant to waiver of notice, the Board of Directors of the Tenabo Mining & Smelting Company elected on the 5th day of February, 1910, assembled and held its first meeting at the principal place of business of said company, room No. 601, Judge Building, Salt Lake City, Utah, at 4 o'clock P. M., on the 5th day of March, 1910. Mr. W. Mont Ferry was elected to temporarily preside and Mr. John Janney was appointed as temporary secretary of the meeting. Messrs. W. Mont Ferry, John Pingree, E. O. Howard, John Janney and Benner X. Smith, being all of said directors, were present.

The secretary presented the waiver of notice pursuant to which the meeting was held. It was ordered to be entered at length in the minutes, and is as follows:

The undersigned, being all of the directors of the Tenabo Mining & Smelting Company, do hereby call the first meeting of the Board of Directors to be held at room 601, Judge Building, Salt Lake City, Utah, on the 5th day of March, 1910, at four o'clock P. M., for the organization of the Board, the election of officers and the transaction of all such business as may be incident thereto, and such other business which may come before said meeting, and we hereby waive all requirements as to notice of such meeting.

(Signed) BENNER X. SMITH.
W. MONT FERRY.
E. O. HOWARD.
JOHN JANNEY.
JOHN PINGREE.

All of said directors being qualified stockholders and having filed their oaths of office as required by law, the election of officers for the company for the next ensuing year, and until their successors are elected and qualified, was then proceeded with and resulted as follows: For President, W. Mont. Ferry, who received five votes. For Vice-president, John Pingree, who received five votes. For Treasurer and Assistant Secretary, E. O. Howard, who received five votes. For Secretary, John Janney, who received five votes. And each and all were declared elected officers as voted for. The [201] permanent officers, so elected, assuming the duties of office

to which they were thus elected, proceeded with the business of the meeting. The following resolution was offered by Mr. Smith and upon being duly seconded was unanimously adopted:

Resolved, that the secretary be instructed to certify the foregoing minutes to the Windsor Trust Company, together with the signatures of the President, Secretary and Treasurer, and that H. P. Clark, former President of this company, be requested to witness said signatures.

Signature of President,
(Signed) W. MONT. FERRY.
Signature of Secretary,
JOHN JANNEY.
Signature of Treasurer,
E. O. HOWARD.

Witness:
(Signed) H. P. CLARK.
H. P. CLARK.
H. P. CLARK.

The following resolutions were then duly proposed, seconded and unanimously adopted. Resolved, that the secretary demand of the former officers of this company all of the books, papers, records, files and other property of the company in their possession. Resolved, that the action of Director Howard in heretofore employing J. W. Edmunds, an Auditor, and causing the books of the company to be audited under his direction, is hereby ratified and approved, and the bill of $25.00 presented for the same is hereby ordered paid. Resolved that Director Smith be authorized and directed to examine

the records of this Company and the abstracts of title to its properties for the purpose of determining the condition thereof. Resolved, that the claim of A. E. Raleigh for assessment work upon the claims of the company amounting to $400.00 be allowed, approved and ordered paid. Resolved, that bill to the Utah Lithographing Company for lithographing stock certificates amounting to $110.00 be authorized to be paid, also bill to Kelly & Company for two stock ledgers, $6.00, and bill to the Breeden Office Supply Company for one minute-book, $3.50, and bills for telegrams, express charges and assaying, which latter bills amount to about $15.00, and be it further Resolved that the Windsor Trust Company be instructed to issue to W. S. McCornick a certificate for 2,000 shares of stock in this company and forward same to E. O. Howard, Cashier of Walker Brothers' Bank, Salt Lake City, Treasurer of this company, and the secretary is directed to certify this resolution to the said Trust Company. Director John Janney proposed the following amendments to the by-laws: (12) The secretary shall have authority to certify the copies of by-laws, copies of resolutions of the Board **[202]** of Directors and copies of other papers and official documents constituting a part of the records of the company. (13) Unless otherwise provided by resolution authorizing same, all contracts. powers of attorneys, deeds, agreements, applications, instruments in writing and all legal documents made and entered into by this company shall be executed by the President and Secretary, who are authorized to affix the corporate seal of

this company thereto. In the absence of the President, the Vice-president may execute said instrument in his stead, and in the absence of the Secretary, the Treasurer may execute such instruments as acting secretary. (14) Three members of the Board of Directors shall constitute a quorum of the Board of Directors for the transaction of business. (15) In the absence of the President, the Vice-president may in all respects perform and carry out the authority of the President, and in the absence of the Secretary, the Treasurer or Assistant Secretary shall act as secretary.

Director Janney moved the adoption of said amendments to the by-laws, which motion was seconded by Director Smith, and upon being put to a vote, said amendments to the by-laws were unanimously adopted. Resolved, that the Directors of this company be allowed as compensation the sum of fifty dollars per month each. Resolved, that Stephens, Smith & Porter, attorneys, be employed as attorneys for the company. Whereupon the proposal of P. B. Locker to sell the treasury stock was taken up and considered. Thereupon Director Pingree offered the following resolution. Whereas, this corporation has no funds with which to carry on its development work, to erect the necessary mills and equipment with which to economically treat and handle its ores, and in general to carry on its business,

Whereas, Mr. Duncan McVichie in his report estimates that a development fund of twenty or twenty-five thousand dollars will block out 100,000 tons of ore in the Gem mine, one of the properties belonging

to this corporation, which ore is now estimated to have an average value of $18.00 per ton.

Whereas, Mr. MacVichie estimates that $25,000 will supply a 100-ton daily capacity mill and that $30,000 will supply a matting plant; Whereas, it would appear that $100,000 or thereabouts expended on the Gem mine would put that property on a dividend paying basis and that other money can be [203] spent to advantage in developing the other properties belonging to this company, which seem to possess greater prospective merits; Whereas, there is remaining in the treasury of this corporation 580,750 shares of stock, 169,250 having been sold at a price of 15 cents per share net to the company,

Whereas, P. B. Locker has negotiations under way with French bankers, appearing to promise a practical plan for the sale of the stock of this corporation, and Whereas, P. B. Locker has offered to undertake the securing of a contract to net the company fifty cents per share for four hundred and fifty thousand shares of stock, or two hundred and twenty-five thousand dollars, now therefore be it, Resolved that this company enter into and that the President and Secretary be and they are hereby authorized and instructed to execute a contract with the said P. B. Locker in terms and figures following, to wit:

AGREEMENT.

This agreement, made and executed this —— day of March, 1910, by and between Tenabo Mining & Smelting Company, a Nevada corporation, hereinafter called the company, and P. B. Locker, of Salt Lake City, Utah, hereinafter called the Agent, Wit-

nesseth: Whereas, the company has four hundred fifty thousand shares of its capital stock remaining in its treasury with which to provide funds for the development and operation of its properties, and the erection of reduction plants, and Whereas, said P. B. Locker is desirous of undertaking the sale of said stock and represents and believes that he can sell a portion of this stock in France and elsewhere, provided the necessary authority be given him to negotiate and execute a contract on behalf of the company and to list the stock upon the French Banking Market, or other markets:

Now, Therefore, for and in consideration of the mutual obligations herein imposed and the sum of one dollar interchangeably paid, the said P. B. Locker agrees and undertakes to provide and furnish all of the fees and expenses for the listing of each one hundred fifty thousand shares of stock provided for in a Special Power of Attorney set forth in the minutes of the company, and all other expenses required by the law of France or elsewhere and all trustee's fees and expenses, and he further agrees at his own expense to go to Paris in the interests of this company and use diligent effort to negotiate said contract. **[204]**

In consideration thereof the company hereby appoints said P. B. Locker its agent and attorney in fact under a special power of attorney (hereinafter referred to), to dispose of four hundred fifty thousand shares of its capital stock now remaining in the treasury, and the company agrees to duly authorize said P. B. Locker by special power of attorney to

make and execute on behalf of the company a contract in terms and effect as set out in the said special power of attorney.

The company further agrees that should said P. B. Locker successfully negotiate said contract, it will pay to the said P. B. Locker for his services from the moneys realized from the sale of said stock, but not otherwise, all in excess of the sum of fifty cents per share, said compensation to said Locker being conditional not only upon the negotiation of said contract, but upon the receipt by the company of the purchase price of said stock. It is mutually agreed that the entire amount of money received from the sale of said stock shall be deposited to the credit of the company upon the delivery of certificates of stock.

It is expressly understood and agreed that the company shall in no way be liable for any fees or expenses for the listing of said stock, or Trustees' fees or expenses, or any other expenses whatsoever, and that each and every share of stock so sold shall net the company fifty cents per share.

From the first money received from the sale of stock, the company shall pay the said Locker the first fifteen thousand dollars advanced to pay taxes and dues for listing the stock on the French market and the three thousand dollars fees to the Trust Company. The company shall, however, be reimbursed said amounts from the moneys received from the sales in excess of said amounts before said Locker shall be entitled to any compensation, the intention being that each and every share of stock sold shall

net the company fifty cents per share. Should the sale of stock be not sufficient to net the company fifty cents per share, the said Locker agrees to reimburse the company in stock out of his personal stock in an amount equal to the amount taken from the treasury and for which the company has not received fifty cents per share. The time allowed said Locker for the carrying out of this contract shall be as follows: Sixty days within which to furnish satisfactory proof to the company that he has entered into [205] contractual relations with reliable persons whereby the sum of $15,000 will be furnished to the agent as needed for listing. Then ninety days to effect his negotiations in Paris or elsewhere and procure the execution of a satisfactory contract as set out in said special power of attorney, provided that in computing these periods of time, the months of June, July and August shall be excepted because of the summer season. Nothing in this contract shall be construed to require the agent to sell any of the said stock in France, but, on the contrary, he may negotiate the sale of the said stock at any other place or places desired by him.

In Testimony Whereof, the company has caused this contract to be signed by its President and its Secretary and its corporate seal to be affixed hereto, and the party of the second part hereto subscribes his signature this —— day of March, 1910.

TENABO MINING & SMELTING COMPANY.

————, President.

————, Secretary.

————, Agent.

Director Smith seconded the resolution. The resolution was thereupon put to a vote and adopted, four voting in the affirmative, Director Janney not voting, being excused. The Board then adjourned to meet at 4:30 o'clock P. M. this day.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated March 5, 1910.]

MINUTES.

Minutes of Directors' meeting of March 5th, 1910, held at its principal place of business at Salt Lake City, Utah, at 4:30 o'clock P. M., pursuant to adjournment of the previous meeting, all of the members of the Board being present, to wit: W. Mont. Ferry, E. O. Howard, John Pingree, John Janney and Benner X. Smith, the meeting being called to order by President W. Mont. Ferry, who presided during the meeting, John Janney, the Secretary, acting as such, whereupon the following proceedings were had: Director Smith offered the following resolution: Whereas, P. B. Locker has been in negotiations with certain parties in Paris, France, looking to the sale of treasury stock in this corporation, and believes that the sale of treasury stock can be effected there through negotiations recently opened up by him,

Whereas, it appears advisable that this corporation by the sale of its treasury stock secure funds for the installation of needed equipment and reduction works and for the further development of its prop-

erty, as well as [206] for carrying on its business affairs in general, now therefore be it

Resolved, that the said P. B. Locker have conferred upon him authority to execute a contract as hereinafter set out and that the president and the secretary of this corporation be and they are hereby authorized and instructed for and on behalf of this company to execute and deliver to the said P. B. Locker a special power of attorney for the purpose of authorizing him to execute such a contract as follows, namely:

SPECIAL POWER OF ATTORNEY.

Know all men by these presents, that the Tenabo Mining & Smelting Company has made, constituted and appointed, and by these presents does make, constitute and appoint Payton B. Locker, its true and lawful attorney for this corporation, and in its name, place and stead, and for its use and benefit, to execute and deliver a contract in words and figures substantially as follows, to wit:

Between the undersigned, the "Tenabo Mining & Smelting Company," a corporation organized under the laws of the State of Nevada, United States of America, with a capital stock of three million dollars, the principal place of business of which is at Salt Lake City, in the State of Utah, United States of America, by Mr. Payton B. Locker, attorney in fact of said company, acting under the powers vested in him by a certain power of attorney authorized and executed in accordance with a resolution of the Board of Directors of said company, adopted at a special meeting held on the 5th day of March, 1910, herein-

after called the Vendor of the one part, and ————, hereinafter called the Bankers, of the other part. It has been arranged and agreed as follows: The Tenabo Mining & Smelting Company, being desirous of placing four hundred fifty thousand shares of its capital stock in Europe of the nominal value of two dollars and the Bankers, after having examined the papers of the said company and the reports of the engineers, agreed to lend their support and the following arrangements have been made between the parties.

Article I. The Vendor agrees to apply through the Bankers to the Minister of Finances and to the Administration for the Registration of Property and Stamps in Paris for the compound duty on the shares and to furnish all necessary documents required by the laws of the French Republic. [207]

It further agrees to supply all documents necessary for the publication prescribed by the laws in the official Journal of the French Republic.

It further agrees to abide by the formalities for obtaining the admission of the shares upon the French Banking market. The Bankers, on the other hand, bind themselves to give all their assistance in respect of these various formalities so that they may be accomplished in the shortest possible time.

Article II. The costs in respect of application for compound duty on the shares and for deposit in respect of annual taxes to the Administration of the Registration of Property and Stamp, as also the compound duty on *comptant* stamping, and further the cost of publication in the official journal for ob-

taining the free circulation of the said shares in France, together with the expenses attached to the quotation of the shares and cost of printing the same to Bearer, as also all cost of advertising in the daily press of Paris and the Provinces, or in other financial papers, and generally the cost of issuing, are altogether reckoned to amount to a minimum sum of $45,000.00. This amount and any expenses exceeding that amount, the Vendor does not agree to supply or pay, and the Vendor is not, nor shall it be in any way liable therefor, but the same shall be subject to arrangement and agreement between the said Payton B. Locker personally and not as attorney in fact and the said Bankers.

Article III. The Vendor hereby gives to the Bankers an option for three months after all necessary documents have been handed over to authorize the placing of shares to place one hundred fifty thousand shares of its capital stock of the par value of two dollars each at a price of 6.25 francs per share. In consideration of said option said Bankers further agree and firmly bind themselves that they will within said three months purchase from said Vendor one half of the said one hundred fifty thousand shares, being seventy-five thousand shares, and pay Vendor for the same within said three months at the price of 6.25 francs per share. In the event of said Bankers having at the expiration of said three months placed and paid for the whole of said one hundred fifty thousand shares, the Vendor hereby gives to the Bankers a further option for six months after the expiration of said three months to [208]

place a further block of one hundred fifty thousand shares of said stock at the price of 6.25 francs per share. In consideration thereof, the said Bankers agree that should they exercise this second option, they will pay to the Vendor for all of said stock they may place the price of 6.25 francs per share, and they further agree and firmly bind themselves that *they should* exercise this second option, they will within six months purchase from said Vendor one-half of said one hundred fifty thousand shares, being seventy-five thousand shares of this second option, and pay Vendor for the same within said six months at the price of 6.25 francs per share. In the event of said Bankers having at the expiration of said six months placed and paid for the whole of said one hundred fifty thousand shares, the Vendor hereby gives to the Bankers a further option for three months, after the expiration of said six months to place a further block of one hundred fifty thousand shares of said stock at the price of 6.25 francs per share. In consideration thereof, the said Bankers agree that should they exercise this third option, they will pay to the Vendor for all of said stock that they may place the price of 6.25 francs per share, and they further agree and firmly bind themselves that should they exercise this third option, they will within three months purchase from said Vendor one-half of said one hundred fifty thousand shares, being seventy-five thousand shares of this third option, and pay the Vendor for the same within said three months at the price of 6.25 francs per share.

Article IV. The shares shall be delivered by a

Trustee and shall represent nominative certificates deposited by the company in the hands of the said Trustee. The shares so delivered shall be to Bearer under the seal of the company with coupons attached and conjointly signed by the duly authorized officers of the company and the Trustee; the said one hundred fifty thousand shares to be first delivered shall be in the following denominations:

20,000 certificates to Bearer of five shares each.

5,000 certificates to Bearer of ten shares each.

And this shall also apply to further blocks of shares so far as same has not been altered, if required by mutual consent of the parties. A specimen of the shares shall be supplied by the Bankers. [209]

Article V. The Bankers bind themselves to obtain as soon as possible a quotation of the said shares on the French Bank market. Nevertheless, the sale of the shares by the Bankers may commence before the necessary formalities in respect of said quotation have been fulfilled.

Article VI. The Vendor agrees and binds itself to have the said shares listed on the New York Curb Exchange.

Article VII. The trust certificate to Bearer shall be lodged by the Vendor in a Parisian Bank to be nominated by the Vendor, which shall hold same at the disposal of the Bankers against payment.

Article VIII. The vendor guarantees not to issue certificates to Bearer for a larger quantity than that of four hundred fifty thousand shares above mentioned, but as the Vendor shall still hold a further one hundred thirty thousand capital shares for dis-

posal, they give by these presents to the Bankers a preference right thereto if the said Vendor decides at any time to place the same, being the said one hundred thirty thousand shares, or part thereof, in Europe.

Article IX. The Vendor binds itself to establish an office of this company at the Bankers Banking House for giving information and shall pay an annual rent of frs. 5,000, provided, however, no rental shall be charged by the Bankers unless and until they have paid for the first one hundred fifty thousand shares under this contract, upon which payment the Vendor binds itself to pay the said 5,000 frs. annually for a period of three years and upon payment by the Bankers for each succeeding one hundred fifty thousand shares, the Vendor binds itself to pay said 5,000 francs for an additional period of three years, provided, further, that the Bankers shall hold the said office properly furnished, lighted and heated and shall without charge furnish one English speaking clerk to tend especially to the business of the Vendor.

Article X. It is hereby agreed that the dividend coupons shall be payable in Paris without any deduction for commission or discount, except legal taxes, and the Bankers are hereby appointed as financial agents for the payment of the said dividends, and shall be allowed a commission of francs five per francs one thousand paid in coupons of the company. [210]

If, however, the Bankers deem it necessary to transfer the payment of the coupons to another bank,

then they shall give the latter the said francs five in respect of each frs. one thousand paid in dividends.

All disputes arising under these presents shall be referred to the Tribunal of Commerce of La Seine, which is hereby declared to be alone competent to deal with same.

Made in duplicate in French and English in Paris this —— day of ———, 1910.

TENABO MINING & SMELTING COMPANY,

Vendor.

By ————————,

Attorney in Fact.

Given and granted unto the said attorney full power and authority to do and perform all acts and things whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as it might or could do if personally present, hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, this corporation causes these presents to be signed by its president and its secretary and its corporate seal to be affixed hereto this —— day of March, 1910.

TENABO MINING & SMELTING COMPANY,

By ————————,

President.

By ————————,

Secretary.

United States of America.

State of Utah,
County of Salt Lake,—ss.

On this —— day of March, A. D. 1910, personally appeared before me, a notary public in and for Salt Lake County, Utah, W. Mont. Ferry and John Janney, both residents of Salt Lake City, Utah, known to me to be the President and the Secretary respectively of the Tenabo Mining & Smelting Company, a corporation, that executed the foregoing instrument and each upon oath did depose that he is the officer of said corporation as above described; that he is acquainted with the seal of the said corporation, and that the seal affixed to said instrument is the corporate seal of said corporation; that the signatures to said instrument were made by officers of said corporation as indicated after said signatures, and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned, and that the same is executed in accordance with and by [211] authority of a resolution of its Board of Directors.

In Witness Whereof, I hereunto set my hand and notarial seal at Salt Lake City and County, State of Utah, the day and year first above written.

_____,
Notary Public.

My commission expires ———.

Director Howard seconded said resolution. The resolution was discussed by the Board and was thereupon put to a vote and adopted unanimously, five Directors voting in the affirmative. Director Smith

offered the following resolution: Whereas, in order to comply with the proposed plan for issuing bearer certificates it will be necessary to obtain the services of a Trust Company in New York City to act for this company. Resolved, that the President and Secretary execute and deliver to P. B. Locker a special power of attorney for such purposes, as follows: Know all men by these presents, that the Tenabo Mining & Smelting Company has made, constituted and appointed and by these presents do make, constitute and appoint P. B. Locker its true and lawful attorney for this corporation and in its name, place and stead and for its use and benefit to execute and deliver a contract in words and figures substantially as follows, to wit: (Here follows a copy of the agreement marked Exhibit 6.)

Giving and granting unto said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as it might or could do if personally present, with full power of substitution and revocation, and particularly the power to substitute for the Windsor Trust Company in the foregoing agreement. any other New York Trust Company of good repute and standing, hereby ratifying and confirming all that said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, The President and Secretary have hereunto set their hands and affixed the seal of

the corporation the —— day of March, one thousand nine hundred and ten.

TENABO MINING & SMELTING COMPANY,

By ————————,
President.

By ————————,
Secretary.

On being seconded by Mr. Howard, the foregoing resolution was unanimously adopted. [212]

Mr. Pingree offered the following resolution:

Resolved, that this, the Tenabo Mining & Smelting Company, a corporation organized under the laws of the State of Nevada, place on the French market, four hundred fifty thousand (450,000) shares of its capital stock of a nominal value of two ($2.00) dollars per share, and that W. Mont. Ferry, President, and John Janney, Secretary, of the company, be and are hereby authorized to comply with all the formalities required by the laws of France for the purpose of obtaining the listing of the said securities on the market in Paris, and particularly to appoint such person as they may select as a responsible representative of the said company in France and to execute such power of attorney in his favor as may be required and all other contracts, agreements and other papers as may be required.

Resolved, that the President and the Secretary may, if they see fit, authorize P. B. Locker to appoint such responsible representative, who will act for the company as such, and may authorize the said P. B. Locker to insert the name of such representative in the afore-

said power of attorney.

Said resolution was seconded by Mr. Smith and being put to a vote was unanimously adopted. On motion the following resolution was duly seconded and unanimously adopted:

Resolved, that the President and Secretary of this company are authorized to execute on behalf of this corporation in the French language the following undertaking:

"The company, 'Tenabo Mining & Smelting Company,' whose head office is at Salt Lake City (Utah State), United States of America, ——— declares it to be its purpose to negotiate, exhibit for sale, issue in France and introduce to the official quotation sheets of the French Bourse four hundred fifty thousand (450,000) shares, Two ($2.00) dollars each, bearing number ———.

The said company agrees to pay the various taxes and fees which will be exacted in France for the duration of the life of this corporation, and appoints as its responsible representative ———."

Resolved, that P. B. Locker is hereby authorized to appoint a French citizen, or a French corporation as a responsible representative of this company and to insert the said representative's name in the foregoing undertaking, as well as the numbers of the certificates. There being no further business the meeting adjourned.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated March 21, 1910.]

Minutes of a Meeting of the Board of Directors of the Tenabo Mining & Smelting Company.

The Directors of the Tenabo Mining & Smelting Company met at the office of the company, 601 Judge Building, Salt Lake City, Utah, at 2 o'clock P. M. on March 21st, 1910, pursuant to the following notice:

Salt Lake City, Utah, March 18, 1910.

To John Pingree, Ogden, Utah, W. Mont. Ferry, Salt Lake City, Utah, E. O. Howard, Salt Lake City, Utah, Directors of the Tenabo Mining & Smelting Co.

Gentlemen: In accordance with the by-laws of said company, the undersigned, two of the directors thereof, hereby call a meeting of the Board of Directors to be held at the office of said company, room 601 Judge Building, Salt Lake City, at 2 o'clock P. M. on Monday the 21st day of March, 1910, for the purpose of electing officers, considering amendments to the by-laws, ratifying and confirming, or rescinding previous actions of the Board, considering and acting upon propositions for the raising of funds for the development of the company's property and the carrying on of its business by the sale of treasury stock, payment of outstanding bills and such other business as may come before the meeting.

(Signed) BENNER X. SMITH,
JOHN JANNEY,
Directors of the Tenabo Mining & Smelting Company.

The original of which is filed with the records of the company. [213]

In response to said notice there were present the following directors: W. Mont. Ferry, John Pingree, E. O. Howard, John Janney and Benner X. Smith. All of the directors being present and each of said directors being the owner, as shown by the books of the company, of not less than 100 shares of the capital stock and each of said directors having subscribed and taken the oath of office as provided by law.

Director Ferry acted as Chairman and called the meeting to order. Director Smith acted as Secretary. Thereupon it was moved, seconded and unanimously adopted that the Board organize by the election of officers. Director Smith nominated the following officers: W. Mont. Ferry as President, John Pingree as Vice-president, E. O. Howard for Treasurer and Assistant Secretary. John Janney, for Secretary. There being no other nominations, a ballot was taken, which resulted in each of said nominees receiving five votes for the respective offices. Thereupon the chairman declared that said persons so nominated had been duly elected to their respective offices. President Ferry assumed his place as President, and Secretary Janney his place as Secretary. The minutes of the meetings of the directors held on March 5, 1910, were then read. Director Smith offered the following resolution and moved its adoption:

Whereas, the Board of Directors, at the meetings held on March 5, 1910, adopted certain resolutions, which have been recorded in the minutes of the Board with reference to the business of the company, and

in particular with reference to the sale of certain treasury stock and the listing of it upon the French Banking market, and authorizing P. B. Locker to represent the company and negotiate and execute certain contracts in reference thereto, and also authorizing the President and the Secretary to execute certain contracts and applications, and

Whereas, said minutes contain a correct record of the proceedings of the board, now, therefore, be it Resolved, by the Board of Directors, that the minutes of the meetings of March 5th, 1910, as the same are recorded, be and they are hereby approved, and that the actions of the Board at its meetings held on March 5th, 1910, and each and all of the several resolutions and authority as shown by the said minutes be and the same are hereby ratified, approved and confirmed with the same force and effect as if they had been adopted at this meeting.

Director Pingree seconded the motion to adopt said resolution, and upon the vote being taken said motion was unanimously carried and said resolution unanimously adopted and so declared by the chairman.

The following resolutions were unanimously adopted:

Resolved, that the Windsor Trust Company be requested to render to this company a statement of the names, residences and amounts of stock of the several stockholders of this corporation as appears from their books and [214] that the said Windsor Trust Company be requested to furnish from time to time hereafter, to this company, a list of such trans-

fers of stock as they may make.

Resolved, that the Windsor Trust Company issue a certificate of stock of this company in the name of W. S. McCornick for 2,000 shares to be charged to the treasury stock account and to be sent to E. O. Howard, Walker Brothers' Bank, Salt Lake City, Utah.

Resolved, that the certificates of stock of this company shall be signed by the President or the Vice-president and by the Secretary or the Treasurer, which officers are hereby authorized to sign the same, and that the acts of H. P. Clark and W. Mont. Ferry as President, and R. T. Badger and John Janney as Secretary, in heretofore signing stock certificates of this corporation are hereby ratified and confirmed.

Resolved, that Judge C. S. Varian be released from his liability as a subscriber to 100 shares of the capital stock of this corporation of the par value of $200, as per request received from him.

Resolved, that a legal fee of $300 to Benner X. Smith be approved and $150.00 of the same be authorized to be paid. That $550 be paid to P. B. Locker on account, and that one month's salary of $50 be paid to each of the directors.

Resolved, that the President and Secretary of this corporation be authorized to have certificates lithographed and furnished as demanded by the needs of the Transfer Agent of this company.

There being no further business, the meeting adjourned.

(Signed) JOHN JANNEY,
Secretary.

A meeting of the Board of Directors of the Tenabo Mining & Smelting Company regularly called, pursuant to notice, was held on the 29th day of April 1910, at 4 o'clock P. M. at the office of the company in Salt Lake City, Utah, the following members being present: W. Mont. Ferry, John Pingree, John Janney, E. O. Howard and Benner X. Smith.

Certain letters were read from Charles E. Kelly, 60 Wall Street, New York City, J. T. Clark, 37 Wall. Street, New York City, and Hiram Tyree, 49 Wall Street, New York City, and the attorney for the company was by resolution unanimously adopted requested to write to the above named parties respectively as follows:

"Mr. J. T. Clark,
37 Wall Street,
New York City.

Dear Sir:

The Board of Directors of the Tenabo Mining & Smelting Company, at a meeting held April 9th, 1910, considered your communication of the 22nd inst., addressed to the individual members of the Board, wherein on behalf of yourself and associates, you demanded the privileges of purchasing your *pro rata* share of any treasury stock that is offered for sale at as low a price as same is offered to any one. The Board has directed me, as attorney for the company, to write as follows: The Board has entered into certain [215] negotiations and contracts and given specific authority to Mr. P. B. Locker looking to the sale of a large block of treasury stock for the purpose of raising funds to develop

and preserve the property of the company, and as to the stock covered by that transaction, the Board is compelled to decline to grant you the privilege to purchase. As to the remaining treasury stock not covered by the above negotiations it is the present intention of the Board not to offer the same for sale until the above negotiations are completed or terminated unless an emergency arises.

Further answering your inquiries, the Board has no record that this company ever furnished to the agents of the New York Curb Stock Committee a statement of its financial condition. We understand that under a former Board a statement was furnished to the Boston Curb. There is now held by the company as treasury stock 579,990 shares.

Yours truly.

Mr. Charles E. Kelly,
60 Wall Street,
New York City.

Dear Sir:

The Board of Directors of the Tenabo Mining & Smelting Company, at a meeting held April 29th, 1910, have directed the undersigned as attorney for the company to write you as follows:

Your favor of April 2nd, 1910, as counsel of the Gem Consolidated Mining Company, was duly received and filed. With reference to the authority of this Board to act, do respectfully request you to determine by proper proceedings the qualifications of the members and the legality of the Board as now constituted.

This Board has tried to the best of its ability to

manage the affairs of the company in the interest of all stockholders, both majority and minority stockholders, and will endeavor to continue to do so.

With reference to your demand for an option to purchase any treasury stock that may be offered for sale, the Board directs me to advise you that this Board has heretofore entered into certain negotiations and contracts and given certain and specific authority to Mr. P. B. Locker looking to the sale of a large block of the treasury stock for the purpose of raising funds to [216] develop and preserve the property of the company, and as to the stock covered by that transaction, the Board declines to grant you an option to purchase. As to the remaining treasury stock not covered by the above negotiations, it is the present intention of the Board not to offer the same until the above negotiations are completed or terminated, unless an emergency arises.

Yours truly.

Mr. H. Tyree,
49 Wall Street,
New York City.

Dear Sir:

At a meeting of the Board of Directors of the Tenabo Mining & Smelting Company, held at Salt Lake City, Utah, on April 29th, 1910, I was directed by the Board as attorney for the company, to answer your favor of the 2nd inst., addressed to the Board of Directors, as follows:

In reference to your alleged contract, agreements, understandings, and negotiations with Messrs. Locker and Janney, or either of them, and the con-

tracts, agreements and understandings between the Gem Company and the Tenabo Consolidated Mines Company referred to in your letter, this Board has no knowledge or record of same, and as they appear to be personal matters in which this company is not a party, it is the opinion of the Board that it should take no part in the same.

In reference to the seventh paragraph of your letter, charging Mr. Locker with selling five thousand shares of the capital stock of this company for the purpose therein stated, the Board had no knowledge of same if such transaction took place, until after it happened, when certain members of the Board were advised by wire from you and Mr. Reilly, and being without knowledge of the transaction, this Board could not have assisted or sympathized with Mr. Locker in the transaction.

And the Board desires you to understand that it has not and will not take any part or become a party to any scheme or transaction to either support or break the public market of the stock of the company, and if you have spent any money to sustain and maintain the market, either in New York or Boston, it was done without the knowledge or consent of this Board, and it expressly disclaims any responsibility therefor, and does not approve same. [217]

Replying to the eighth paragraph of your letter, the Board advised you that it has entered into certain specified agreements with Mr. Locker, looking to the sale of certain of the treasury stock of this company for the purpose of raising funds to preserve and develop the property. The authority con-

ferred upon Mr. Locker is specific and not discretionary, and it was the opinion of the Board, after investigation and deliberation that the plan adopted by the Board to finance the company and the authority given Mr. Locker were reasonable and fair, and for the best interests of the company and of the stockholders, but assuming that Mr. Locker is all that you charge him to be, he cannot under his authority bind the company beyond the express authority already granted.

Replying to the tenth paragraph of your letter, will say that if the assessment work upon the claims referred to was not performed, it was not the fault of this Board, as such assessment work should have been performed while the former Board, which was of your choice, was in office.

We will advise you, however, that the records of the company show that the assessment work upon these claims was performed and the amount of same paid. Yours truly.

There being no further business, the meeting on motion adjourned.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated July 1, 1910.]

Minutes of a Meeting of the Board of Directors, Held July 1st, 1910.

A meeting of the Board of Directors of the Tenabo Mining & Smelting Company was held at the office of Stevens, Smith & Porter, Judge Building, Salt

Lake City, Utah, at 3 o'clock P. M., on Friday, the 1st day of July, 1910, pursuant to call regularly made, the following members being present: W. Mont Ferry, Benner X. Smith and John Janney. The following business was transacted: The resignation of E. O. Howard was tendered on account of his absence from the city, and the same was unanimously accepted. N. B. Robertson being a stockholder of record of not less than 100 shares, was nominated to fill the vacancy caused by the resignation of Mr. Howard, and unanimously elected.

It was moved, seconded and unanimously adopted that the by-laws of this company be amended in the following particular, namely, that by-law XVI [218] be added to the by-laws heretofore adopted by this company in words as follows:

> "Any action of a majority of the Board of Directors, although not at a regularly called meeting, and the record thereof, if consented to in writing by all of the other members of the Board, shall always be as valid and effective in all respects as if passed by the Board in regular meeting."

The following letter from Dr. Geo. J. Waggoner of Revenna, Ohio, was read:

"On Board R. M. S. 'Adriatic.'
April 16th, 1910.

Tenabo Mining & Smelting Company,
Salt Lake City, Utah.

Gentlemen:

In confirmation of Mr. Locker's letter of April 11th, I desire to say that I have agreed to furnish

$15,000 to pay the necessary expenses for placing the treasury stock of the company on the French market. I am accompanying Mr. Locker for the express purpose of paying over this sum in compliance with the terms of the agreement.

Very truly yours,

(Signed) GEO. J. WAGGONER."

Whereupon the following resolution was offered:

Whereas, a contract entered into between this company and P. B. Locker on the 23rd day of March, 1910, requiring that P. B. Locker, within sixty days from the date thereof furnish satisfactory proof to this company that he had entered into contractural relations with reliable persons whereby the sum of fifteen thousand ($15,000) dollars will be furnished to the agent as needed for listing the stock of this company on the French market, and Whereas, George J. Waggoner is represented to us as a reliable person, now therefore be it resolved, that the foregoing letter from the said George J. Waggoner be accepted as satisfactory proof of the said contractural relations required to be furnished within sixty days from the date of said contract.

Said resolution was duly seconded and unanimously adopted. It was moved, seconded and unanimously adopted that the payment of the following bills be approved:

John Tyree, labor on Reliance claims	5.00
Century Ptg. Co. 1,000 letter-heads	5.00
Union Assay Office, assaying	8.10

J. W. Currie, assaying.....	3.00
Postal Tel. Co. Cables & Telegrams..	14.06
Windsor Trust Co. for furnishing list of stockholders.....	10.00
Total..... ....$90.16	

There being no further business the meeting on motion adjourned.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated September 21, 1910.]

Minutes of a Special Meeting of the Board of Directors, Held Sept. 21, 1910.

A special meeting of the Board of Directors of the Tenabo Mining & Smelting Company was held at the office of Stevens, Smith & Porter, Judge Bldg., Salt Lake City, Utah, at 2:30 o'clock P. M., on Wednesday, September 21st, 1910, pursuant to call regularly made, the following members being present: [219] W. Mont. Ferry, Benner X. Smith, and John Janney. The following business was transacted:

The resignation of Director N. B. Robertson to take effect at the pleasure of the Board was tendered and upon motion duly made and seconded was unanimously accepted. Mr. E. O. Howard was elected by unanimous vote as director and treasurer to fill the vacancy created by the resignation of N. B. Robertson. A letter from Windsor Trust Company proposing to submit bids for the engraving of

certificates was read. The secretary was directed to request the Windsor Trust Company to submit bids. The meeting on motion adjourned until Friday, September 23rd, at 2:30 P. M.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated September 23, 1910.]

Minutes of a Special Meeting of Directors, Sept., 23, 1910.

A Special meeting of the Board of Directors of the Tenabo Mining & Smelting Co., was held at the office of Stephens, Smith & Porter, Judge Building, Salt Lake City, Utah, at 2:30 P. M., on Friday, Sept. 23d, 1910, pursuant to adjournment of previous meeting, the following members being present: W. Mont. Ferry, John Pingree, E. O. Howard, Benner X. Smith and John Janney. The following business was transacted:

Letters from P. B. Locker in Paris were read to the Board, also a copy of a contract with certain bankers in Paris together with an Underwriting Agreement, from which it appeared that the expense incident to the sale of the initial block of treasury stock, namely, 150,000 shares, would be $30,000 instead of $15,000 as formerly contemplated.

Thereupon the request of Mr. Locker that the company pay the expense incident to the sale of the first block of stock was discussed. It was moved by Mr. Pingree, seconded by Mr. Howard that the contract between Mr. Locker and this company be

amended and modified in the following particular, Namely: That for the first 75,000 shares, or any part thereof, sold under a contract dated March 22d, 1910, entered into between this company and P. B. Locker, this company shall accept fifteen cents less per share than provided in said contract, and that for the next 75,000 shares sold under said contract this company shall receive fifteen [220] cents more per share than provided in said contract, thus making the average price of the stock net the company the same figure and at the same time allow P. B. Locker a larger margin with which to defray expenses of placing the initial block of 75,000 shares. Said motion was duly carried, directors Ferry, Pingree, Howard and Smith voting in the affirmative, Director Janney not voting, being excused. The following resolutions were unanimously adopted:

Resolved, that the Windsor Trust Company be and is hereby authorized and instructed to issue four hundred and fifty thousand (450,000) shares of treasury stock to itself as Trustee under and by virtue of a certain stock trust agreement authorized to be made and executed on behalf of this company by and between this company, the Windsor Trust Company and a French Banking House to be satisfactory to the Windsor Trust Company in a special power of attorney conferred upon P. B. Locker, attorney in fact, at a meeting of this Board of Directors held on the 5th day of March, 1910.

Resolved, that the Windsor Trust Company be authorized to hold said four hundred and fifty thousand (450,000) shares of treasury stock to secure the

issue of them by four hundred and fifty thousand (450,000) shares in bearer certificates in a denomination of ten (10) shares each to be issued in accordance with the custom of the French market.

The meeting then adjourned to meet in the same office on Saturday, October 8th, 1910, at 2:30 P. M.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated October 10, 1910.]

Minutes of Directors' Meeting—Oct. 10, 1910.

A meeting of the Board of Directors of the Tenabo Mining & Smelting Company was held at the office of Stephens, Smith & Porter, Judge Building, Salt Lake City, Utah, at 11 A. M. on Monday, October 10th, 1910, pursuant to adjournment of previous meeting, the following named members being present: E. O. Howard, Benner X. Smith, and John Janney. The following resolution was unanimously adopted:

Resolved, that Lebanon M. Huntington and Fred Billman of the Windsor Trust Company, New York City, be and they are hereby elected First Assistant and Second Assistant Secretaries, to sign for and on behalf of this corporation the Trustee Certification endorsed by the company upon the French bearer certificates to be issued by the Windsor Trust Company, Nos. 1 to 45,000, inclusive.

Hereby rectifying and confirming the signatures of the said Lebanon M. Huntington and Fred Billman to the aforesaid trustee certificates. On mo-

tion the meeting adjourned to meet October 29th, at 9:30 A. M. at the same place.

(Signed) JOHN JANNEY,
Secretary. [221]

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated October 29, 1910.]

Minutes of Special Meeting of Directors—Oct. 29th, 1910.

A special meeting of the Board of Directors of the Tenabo Mining & Smelting Co. was held, pursuant to adjournment of previous meeting, at 9:30 A. M., on Saturday, October 29th, 1910, in the office of Stephens, Smith & Porter, in the Judge Building, Salt Lake City, Utah, the following members being present: W. Mont. Ferry, E. O. Howard, Benner X. Smith and John Janney. The following resolutions were adopted:

Whereas, on the 5th day of March, 1910, this Board of Directors authorized the execution of a certain power of attorney to P. B. Locker conferring authority to enter into a certain contract binding this company to the sale of a block of treasury stock with proposed bankers in France, which said power of attorney was afterwards executed and delivered to the said P. B. Locker, and

Whereas, the said P. B. Locker has advised this Board that, acting under said power of attorney, he has executed a contract with Bernard Desouches of 148 Avenue Malakoff, Paris, France, in words and figures following, to wit:

Between the undersigned: The Tenabo Mining &

Smelting Company, a corporation organized under the laws of the State of Nevada, United States of America, with a capital stock of 3,000,000 (three million) dollars, the principal place of business of which is at Salt Lake City, in the State of Utah, United States of America, by Mr. Payton B. Locker, attorney in fact of said company, acting under the powers vested in him by a power of attorney authorized and executed in accordance with a resolution of the Board of Directors of said company, adopted at a special meeting held on the Fifth day of March, 1910, hereinafter called the Vendor, of the one part,

And Mr. Bernard Desouches, of 148 Avenue Malakoff, Paris, hereinafter called the Banker, of the other part. It has been arranged and agreed as follows:

The Tenabo Mining & Smelting Company, being desirous of placing four hundred fifty thousand shares of its capital stock in Europe of a nominal value of two dollars each, and the Banker after having examined the papers of said company and the reports of the engineers agrees to lend his support and the following arrangements have been made between the parties.

Article I. The Vendor agrees to supply through the Banker to the Minister of Finances and to the Administration for the Registration of Documents State Property and Stamp in Paris for the assessment of the duties payable in France on the shares (Abonnement au timbre) and to furnish all necessary documents required by the laws of the French Republic. It further agrees to supply to the Banker all documents necessary for publication prescribed

by the laws in the Official Journal of the French Republic. It further agrees to abide by the formalities for obtaining admission of the shares upon the French Banking market. The Banker, on the other hand, binds himself to take the various steps necessary in respect of these various formalities, so that it may be accomplished as soon as the Vendor will have accepted the Underwriting subscription mentioned under Article III hereafter.

Article II. The cost in respect of application for the assessment of the duties payable in France on the shares and for the deposit of guaranty in respect of annual taxes, and further the cost of publication in the Official Journal and for the obtaining the free circulation of the said shares in France, together with the expenses attached to the quotation of the shares and costs of printing the same to Bearer, as also all cost of advertising in the daily press of Paris and the provinces, or in other financial papers, and generally the cost of issuing, advertising and placing the said shares in the French public are altogether reckoned to amount to a sum of one hundred and fifty thousand francs. This amount [222] or any part thereof, and any expense, if any, exceeding this amount the Vendor does not agree to supply or pay excepting as herein recited in Article V, and the Vendor is not, nor shall it be in any way liable therefor except as recited in said Article V.

Article III. The Vendor hereby gives to the Banker an exclusive option from the date of the signature of the present agreement until September 30th, 1910, to purchase four hundred and fifty thou-

sand shares of its capital stock of the par value of two dollars each at a price of seven francs per share, under the terms and conditions as hereinafter set forth.

In consideration of the said option and by way of exercise in part of their said rights of option, the Banker agrees that he will undertake to form an underwriting syndicate to which this contract will be assigned, and will endeavor to secure subscriptions to be submitted to the Vendor and acceptable to him in an amount of seventy-five thousand shares of the stock forming the subject of this option or any lesser amount which the Vendor may decide to accept in his discretion the subscriptions to be secured from reliable parties and under the terms and conditions set forth in the attached form marked Exhibit "A."

It is expressly agreed that out of said 75,000 (seventy-five thousand) shares a minimum number of 25,000 (twenty-five thousand) shares must be so subscribed at the latest on August 31st, 1910, and it is further agreed that the Vendor will have in the case of each individual subscription the right to accept or refuse the same in his discretion.

In the event of the said banker not having on or before September 30th, 1910, so secured subscriptions which shall have been accepted by the Vendor in an amount of seventy-five thousand shares, or any other accepted by the Vendor at the price of seven francs per share, out of which 25,000 (twenty-five thousand) shares shall have been subscribed before

August 31st, 1910, then and in that case the option hereinabove recited to stand annulled and canceled and without liability on the part of either party hereto.

On the other hand, it is agreed and understood that provided the Banker does secure such subscription which shall have been accepted by the Vendor after they shall have been submitted to him in an amount aggregating seventy-five thousand shares of any other amount accepted by him on or before September 30, 1910, the Vendor hereby gives to the Banker an extension of the option hereinabove recited until December 31st, 1910. The Underwriting Syndicate to whom said option shall have been assigned shall pay the Vendor for the said 75,000 (seventy-five thousand) shares on or before December 31st, 1910, at the price of seven francs per share, payable against delivery as thereinafter explained.

In the further event of the said banker not having, through the Underwriting Syndicate on or before December 31st, 1910, purchased and paid for an aggregate number of one hundred and fifty thousand of said stock (including the seventy-five thousand shares as above mentioned) at the price of seven francs per share, then and in that case the option hereinbefore recited to stand annulled and cancelled, notwithstanding the obligation on the part of the Underwriters to pay for seventy-five thousand shares so purchased by them.

On the other hand in the event of the said banker having on or before December 31st, 1910, so purchased and paid for one hundred and fifty thousand

shares of the said stock at the price of seven francs per share through the Underwriting Syndicate, the vendor hereby gives to the banker a further extension of the option on the remaining shares until March 31st, 1911.

In the still further event of the said banker not having through the Underwriting Syndicate on or before March 31st, 1911, purchased and paid for a further one hundred and fifty thousand shares (making altogether three hundred thousand shares) at the price of seven francs per share, then and in that case the option hereinbefore recited to stand annulled and cancelled.

On the other hand in the event of the said banker having on or before March 30th, 1911, so purchased and paid for a total of three hundred thousand shares at the price of seven francs per share through said Underwriting Syndicate, the Vendor hereby gives to the banker a further extension of the option on the remaining shares for three months, and until June 30th, 1911. [223]

Article IV. The shares shall be delivered by a Trustee and shall represent nominative certificates deposited by the company in the hands of the said trustee. The shares so deposited shall be to Bearer under seal of the company with coupons attached and conjointly signed by the duly authorized officers of the company and the trustee. The said four hundred and fifty thousand shares to be delivered shall be in the denomination of certificates to Bearer of ten shares each.

Article V. It is agreed and understood that

the vendor will repay from money received by it, if any, under this contract and not otherwise an agreed amount of (150,000) one hundred fifty thousand francs provided in Article II and which shall have been paid by the banker or his assignees; and to this end will instruct the bank holding against payment the certificates of stock as provided in Article VII to pay from the first money received by it under this contract a total of one hundred and fifty thousand francs, the said one hundred and fifty thousand francs to be paid to the Managing Committee of the Underwriting Syndicate.

ArticleVI. The banker binds himself to obtain as soon as possible a quotation of the said shares on the French Bank market of the Code Vidal or Desfosses, nevertheless the sale of the shares by the banker may commence before the necessary formalities in respect of said quotation have been fulfilled.

Article VII. The Trust Certificates to Bearer shall be lodged by the Vendor in a Parisian Bank appointed by the Vendor, which shall hold the same at the exclusive disposal of the banker or his assignees against payment.

Article VIII. The Vendor guarantees not to issue certificates to Bearer for a larger quantity than that of four hundred and fifty thousand shares above mentioned, but as the Vendor still holds a further block of capital shares for disposal be given by these presents to the banker a preference right thereto if the said Vendor decided at any time to place the same in Europe, that is to say in case the whole four hundred and fifty thousand shares forming the object of the

option given to the banker under Article III of the present agreement shall have been placed within the time of the option, the Vendor will give as to any further shares a right of preference to the banker at the same price and at the same conditions which may be offered by any other party, the banker in such contingency to declare within one month whether they will accept or not the offer thus made to him by the Vendor.

Article IX. The Commercial Court of the Seine will have jurisdiction as to any question which may arise in the construction of the present agreement or at the occasion of its execution.

Article X. The Registration expenses of the present contract, as also any fines, will be paid by the party who shall have rendered such payments necessary.

Made in duplicate in French and English in Paris this first day of August, 1910.

Read and approved.

TENABO MINING & SMELTING CO.
(Signed) By P. B. LOCKER,
Atty. in Fact.

(Signed) BERNARD DESOUCHES.

EXHIBIT "A."

Dear Sirs:

In reply to the offer you have made to me, I hereby subscribe to the Underwriting Syndicate on the following conditions:

Article I. An underwriting syndicate is formed between the persons signing the present form for the following purposes: 1. To purchase 75,000 (seventy-

five) ordinary shares of the Tenabo Mining & Smelting Co. of a nominal value of $2.00 (two dollars) each at a price of seven francs per share. 2. The sale of the said shares before those referred to under No. 3 hereafter. 3. The right to exercise the option given to Mr. Bernard Desouches for 375,000 (three hundred and seventy-five thousand) further shares of the same company and the sale thereof.

Article II. All shares subscribed by the underwriters, members of this syndicate, will remain blocked for sale until the 30th of June, 1911, together with the shares given in option to Mr. Bernard Desouches by The [224] Tenabo Mining & Smelting Co. and amounting to a further block of 375,000 (three hundred and seventy-five thousand) shares, also at the price of seven francs per share; this option is contained in an agreement passed between the Tenabo Mining & Smelting Co., and Mr. Bernard Desouches, dated the first day of August, 1910.

Article III. The Underwriting Syndicate will be managed by a committee of three members, to wit: Mr. Coleman, the Manager of the Banque Franco-American, representing the Tenabo Mining & Smelting Co., and two others to be elected by the majority of the members of the syndicate, every one thousand giving a right to one vote. Until such election takes place, Mr. Coleman will have alone all powers of management and will summon the members of the syndicate as soon as completed for the purpose of electing the two other members of the Managing Committee.

Article IV. The profits resulting from the negotiations of said 450,000 (four hundred and fifty thou-

sand) shares (to wit, the 75,000—seventy-five thousand shares purchased by the underwriters and the 375,000—three hundred and seventy-five thousand—given in option by the company) will after deducting expenses be divided as follows:

10% (ten per cent) to Mr. Bernard Desouches as holder of the option.

10% (ten per cent) to the Managing Committee in remuneration of its services.

80% (eighty per cent) to the underwriters, members of the syndicate, in proportion of the number of shares subscribed.

Article V. The Managing Committee shall have full power with regards to the sale of the aforesaid 450,000 (four hundred and fifty thousand) shares for the common account of the members of the syndicate and also for the use of any sums put at the disposal of the syndicate to cover publicity expenses, costs of issue and the expenses with the legal and fiscal formalities and the obtaining of a quotation. These expenses, which have been estimated at a sum of one hundred and fifty thousand francs, will be paid by the company out of the proceeds of the first shares sold and until such sales have been effected the funds required will be supplied to the Committee under a contract between Mr. Payton B. Locker and Mr. Desouches.

Article VI. Each member of the syndicate, when signing the present syndicate agreement, shall have the right to exclude from sale all or any part of the shares subscribed by him, but these shares so excluded shall be paid for on December 31st, 1910, and

shall be deposited with the syndicate until its liquidation.

Article VII. If the whole of the 75,000 (seventy-five thousand) shares subscribed by the underwriters, members of the syndicate, and not excluded from sale should not be all sold by the syndicate before the 31st of December, 1910, the balance will be paid by all the syndicate members in proportion to the number of shares subscribed by them and not excluded from the sale, but the said shares shall remain deposited with the syndicate until its liquidation. The present document contains a binding engagement on the part of the underwriters, members of the syndicate, to pay for the shares which shall be so divided between them, the said payment to be made by them on the 31st of December, 1910. All shares which shall have been taken up and paid for by members of the syndicate at the price to be fixed by the Managing Committee will be deducted from this liability.

Article VIII. The syndicate will be dissolved upon the realization of its object and not later than June 30th, 1911. It may, however, be prolonged by the Managing Committee for a period not exceeding six months.

The undersigned, after having duly noted the conditions of the foregoing underwriters syndicate agreement, hereby adheres to the same and purchases on the conditions aforesaid ——— shares of $2 (two dollars) each at the price of seven francs per share

of which ——— shares be excluded from sale.

Paris this ———, 1910.

Approved the above form.

TENABO MINING & SMELTING CO.

(Signed) P. B. LOCKER,
Atty. in Fact.

(Signed) BERNARD DESOUCHES.

Now, therefore, be it resolved that the execution of the aforesaid contract with the said Mr. Bernard Desouches be and the same is hereby ratified and [225] confirmed, and

Resolved that a certified copy of this resolution be forwarded by registered mail to the said Bernard Desouches and also to P. B. Locker.

Whereas under a contract authorized by this Board on March 5th, 1910, to be made between this company and P. B. Locker, it is required as follows:

"Then ninety days to effect his negotiations in Paris or elsewhere and procure the execution of a satisfactory contract as set out in said special power of attorney; provided that in computing these periods of time the months of June, July and August shall be excepted because of the summer season."

Now, therefore, be it resolved that the said Locker has complied with the above terms of his contract in furnishing a satisfactory contract within the time required.

Resolved, that the Windsor Trust Company be and is hereby authorized and instructed to forward to the Banque Franco-Americane, 22 Place Vendome, Paris, France, French Bearer Certificates heretofore authorized under and by virtue of a certain trust agree-

ment with the said Windsor Trust Company, authorized by this Board at its meeting on March 5th, 1910, said French bearer certificates being in a denomination of ten shares each for four hundred and fifty thousand shares, numbered from 1 to 45,000 inclusive, and that the same be insured and otherwise protected as is usual in remitting such securities, and that remittances be made in such installments as may be convenient to the Windsor Trust Company and the Banque Franco-Americane.

Together with instruction that the said Banque Franco-Americane hold the aforesaid French Bearer certificates for and on behalf of the Tenabo Mining & Smelting Company and deliver the same to Bernard Desouches of 148 Avenue Malakoff, Paris, France, or to his order, upon the payment of seven francs per share, and not otherwise, said seven francs per share to be deposited to the credit and subject to the order of the Tenabo Mining & Smelting Company in writing and signed by its president and its treasurer, as per specimen signatures following: The president will sign, ————. The treasurer will sign, ————; and

Resolved, that a certified copy of the above resolutions be sent to the Windsor Trust Company of New York and to the Banque Franco-Americane, Paris, France.

Resolved, that T. L. Zimmerman, Jr., C. Knapp, L. W. Chandler and Geo. H. Eastmont be and they are hereby elected, constituted and appointed assistant secretaries and that T. L. Zimmerman, Jr., and C. Knapp be and they are hereby elected, constituted

and appointed Vice-presidents as well as assistant secretaries for the purpose of signing, for and on behalf of this company, said company's certification on the issue of French Bearer Trustee Certificates, Nos. 1 to 45,000 inclusive, for circulation on the French market, and also for signing nominative certificates in like [226] amount and with like numbers to be held by the said Windsor Trust Company against the presentation of the French Bearer shares.

Resolved, that the secretary of this company be empowered to authorize the Union Trust Company of New York to register the four hundred and fifty thousand (450,000) shares of stock held by the Windsor Trust Company in certificates of ten shares each against the issue by the said Windsor Trust Company of French Bearer shares, and

Resolved, that the secretary use his best efforts to postpone as long as may be all expense incident to said registration.

The meeting on motion adjourned until Monday, November 7th, 1910, to meet at the same place at *2:3* P. M.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated November 7, 1910.]

Minutes of a Special Meeting of Directors—November 7th, 1910.

At an adjourned meeting held at 2:30 P. M. on Monday, November 7th, 1910, Directors Howard, Smith and Janney being present, the following reso-

lutions were unanimously adopted as an aid to the secretary in carrying out the resolution passed at the previous meeting relating to the registry of the American of nominative certificates held by the Windsor Trust Company against the French Bearer shares:

Whereas, the Windsor Trust Company has been heretofore authorized to issue to itself or order four hundred and fifty thousand (450,000) shares of the treasury stock of this corporation as a basis for the issue by the said Windsor Trust Company of French Bearer shares in like amount, and

Whereas, acting thereunder the said Windsor Trust Company has issued to its order a certificate of stock for four hundred fifty thousand (450,000) shares, now therefore be it

Resolved, that the Union Trust Company of New York City be and the same is hereby authorized to register the aforesaid certificate for 450,000 shares of stock, charging the same to the treasury stock of this corporation.

Whereas, a certificate of 450,000 shares of the treasury stock of this company has been issued to the order of the Windsor Trust Company to be held by the said Windsor Trust Company to secure an issue of French Bearer Trustee certificates in denominations of ten shares each for 450,000 shares, to wit, trustee certificates Nos. 1 to 45,000 for ten shares each;

Whereas, the Windsor Trust Company will keep upon deposit corresponding nominative certificates Nos. 1 to 45,000 (ten shares each) signed by duly

authorized officers of this company in blank, and held by the said Windsor Trust Company for delivery to the holders of French Bearer certificates upon demand, presentation and cancellation of the said bearer shares, and

Whereas, upon delivery of the aforesaid nominative certificates to the lawfully entitled owner thereof it will become necessary to cancel the certificate of 450,000 shares of stock originally issued and register the nominative certificate given in exchange for the bearer or trustee certificate, now therefore be it

Resolved, that the Union Trust Company of New York is hereby authorized to register the nominative certificates when and as the same may be presented for registration by the holders of the French bearer trustee certificates after demand and presentation to the Windsor Trust Co., and the [227] cancellation by them of the said French bearer trustee certificates; it being the purpose of this resolution to confer authority upon the said Union Trust Company to register the aforesaid nominative certificates as and when they are demanded by and issued to the holders of and in exchange for French bearer shares and not otherwise. The said 450,000 shares, or so much thereof as may remain after prior transfers, in the meantime being registered in the name as now appearing upon the registration books of this company.

On motion the meeting adjourned to meet at 10:30 A. M., on Wednesday, November 16th, 1910, at the same place.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated November 16, 1910.]

Directors' Meeting of Nov. 16th, 1910.

Held in the office of Stephens, Smith & Porter in the Judge Building, Salt Lake City, Utah, at 10:30 A. M. on Wednesday, November 16th, 1910, pursuant to adjournment of previous meeting, there being present,—W. Mont. Ferry, Benner X. Smith and John Janney, and the following business was transacted: The following resolutions were unanimously adopted:

Whereas, at a meeting of the Board of Directors of this company duly held on the 29th day of October, 1910, a contract between this company and Mr. Bernard Desouches of Paris, France, was approved, containing the following provision:

Article V. It is agreed and understood that the Vendor will repay from money received by it, if any, under this contract and not otherwise an agreed amount of (150,000) one hundred and fifty thousand francs provided in Article II and which shall have been paid by the banker or his assignees; and to this end will instruct the bank holding against payment the certificates of stock as provided in Article VII to pay from the first money received by it under this contract a total of one hundred and fifty thousand francs to be paid to the Managing Committee of the Underwriting Syndicate. Now therefore be it

Resolved, that La Banque Franco-Americane, 22 Place Vendome, Paris, France, be and the same is

hereby authorized and directed to pay to the managing committee of the syndicate underwriting the stock issue of the Tenabo Mining & Smelting Company, as represented by J. H. Coleman, manager of the said committee, being the same J. H. Coleman who is also manager of the Banque Franco-Americane; said Underwriting Syndicate being the same referred to in a contract between this corporation and Mr. Bernard Desouches, dated August 1st, 1910, an amount not to exceed one hundred and fifty thousand (150,000) francs and charge the same to such deposits as are made to the credit of the Tenabo Mining & Smelting Company and subject to the order of said company.

The aforesaid payments shall be made from the first money credited from the sale of stock and may be made in installments from time to time as money is deposited to the credit of the said Tenabo Mining & Smelting Company, but in no case shall the aggregate payments exceed a total of one hundred and fifty thousand (150,000) francs and such payment shall be made only upon a statement of expenses being filed with the said [228] Banque Franco-Americane by the said J. H. Coleman, representative of the Underwriting Syndicate, which statement shall have been approved by Mr. Payton B. Locker of the Hotel Chatam, Paris, France, the above-authorized payments to be limited to the amount of expenditure as shown in the said statement.

Whereas, the secretary of this company has received a communication from Mr. Payton B. Locker requesting that commissions be paid to Messrs. J. H.

Coleman, Henry Iselin, George Kroll and Wm. Ballin, amounting in the aggregate not to exceed a total of two (2) francs per shares, and

Whereas, the price provided in the contract for the sale of the stock is more than two francs per share over and above the price required of said Peyton B. Locker that the stock shall net the company under a contract between this company and the said Peyton B. Locker, now therefore be it

Resolved, that the request of Peyton B. Locker be carried out and that the Franco-Americane Banque be authorized to pay to the said Messrs. Coleman, Iselin, Kroll and Ballin an amount aggregating not to exceed two (2) francs per share as commission on each share sold after the sale of the first twenty-one thousand and four hundred and twenty-nine (21,429) shares upon the order of the said Peyton B. Locker, and that if he gives such order the amounts are to be charged to his account.

In order to carry out the foregoing assignments in part of commission of Peyton B. Locker, the following resolution was offered, duly seconded and unanimously adopted:

Resolved, that the Franco-Americane Banque be and the same is hereby authorized and directed to pay to Messrs. J. H. Coleman, Henry Iselin, George Kroll and Wm. Ballin, certain sums of money hereinafter designated upon the order of Mr. Peyton B. Locker of the Hotel Chatam, Paris, France, from moneys deposited to the credit of the Tenabo Mining & Smelting Company with the said Franco-Americane Banque from the sale of the said company's

stock under a contract between the said company and Mr. Bernard Desouches, upon the following conditions, namely:

1st. The proceeds of the sale of the first twenty-one thousand four hundred and twenty-nine (21,429) shares, namely one hundred and fifty thousand (150,000) francs, shall be placed to the credit of the said Tenabo Mining & Smelting Company, and no part thereof shall be subject to this order.

2nd. For each sale after the said twenty-one thousand four hundred twenty-nine (21,429) shares, this order upon the company's funds shall become effective in an amount not to exceed the aggregate two (2) francs for each and every share of stock sold in excess of twenty-one thousand four hundred and twenty-nine.

The purpose of this resolution is that there shall remain to the credit of the Tenabo Mining & Smelting Company not less than five (5) francs per share and that there shall be disbursed to Messrs. Coleman, Iselin, Kroll and Ballin an amount not to exceed in the aggregate two (2) francs from each and every share of stock sold after the sale of the first 21,429.

Resolved, that a certified copy of this resolution be forwarded to Mr. Peyton B. Locker.

On motion meeting adjourned to meet at 11 o'clock A. M. on Wednesday, December 6th, 1910, at the same place.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated December 6, 1910.]

Directors' Meeting of Dec. 6th, 1910.

Held pursuant to adjournment of previous meeting at 11:00 o'clock A. M. on Tuesday, December 6th, 1910, in the office of Stephens, Smith & Porter, there being present: W. Mont Ferry, E. O. Howard, Benner X. Smith and John Janney. The matter of assessment work for 1910 on the company's property was discussed. Mr. Smith moved that Mr. Janney be appointed to negotiate [229] a loan of $3000 on the company's note to be secured if necessary by a mortgage on the property. Motion was seconded by Mr. Howard and unanimously adopted. The following resolution was adopted:

Resolved, that the resolution passed at the Directors' meeting of Oct. 29th, 1910, appointing secretaries and vice-presidents for the purpose of signing French certificates and the nominative certificates corresponding thereto be amended to read as follows:

Resolved, that T. L. Zimmerman, Jr., C. Knapp, L. W. Chandler and Geo. H. Eastman be and they are hereby elected, constituted and appointed assistant secretaries, and that T. L. Zimmerman, Jr., be and he is hereby elected, constituted and appointed vice-president, as well as assistant secretary, also that C. Knapp be and he is hereby elected, constituted and appointed second vice-president, as well as assistant secretary for the purpose of signing for and on behalf of this company said company's certifi-

cation on the issue of French bearer trustee certificates, Nos. 1 to 45,000, inclusive, for circulation on the French market, and also for the purpose of signing nominative certificates in like amount with like numbers to be held by the Windsor Trust Company of New York against the presentation of the French bearer shares.

A letter under date of Nov. 17th, 1910, from the Union Trust Company of New York requested that their fee be raised from $150 a year to $250 a year was read and discussed. It was moved, seconded and unanimously adopted that said fee be raised from $150 to $250 a year for services as registrar, beginning Nov. 1st, 1910, the same to be paid semi-annually.

The following bills were approved and ordered paid. Century Printing Co., $12.00; Postal Tel. Co., .75. On motion meeting adjourned to meet Dec. 13, 1910, at 2:30 P. M.

(Signed) JOHN JANNEY.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated December 13, 1910.]

Directors' Meeting, Dec. 13th, 1910.

Held pursuant to adjournment of previous meeting at 2:30 P. M. on Tuesday, December 13th, 1910, at the office of Stephens, Smith & Porter, there being present, W. Mont Ferry, Benner X. Smith, E. O. Howard and John Janney. The following resolution was unanimously adopted:

Resolved, that the president and secretary of this company be and they are hereby authorized and

directed to make a loan of $1500 and to execute on behalf of the company a negotiable note for said amount payable six months after date to the order of W. H. Shearman with interest at the rate of 10 per cent per annum, payable at the Merchants Bank of Salt Lake City, Utah, and to execute a mortgage on the properties of this corporation securing the aforesaid obligation, and be it further

Resolved, that in consideration of the aforesaid loan this corporation pledge to the Merchants Bank that of the funds received by said corporation it will deposit with the said Merchants Bank an amount equal to that deposited with such other bank in Salt Lake City, as this corporation may select as depository, and that a bonus of 1,000 shares of treasury stock be given in consideration of said loan, and

Resolved, that the Windsor Trust Company be authorized and requested to issue two certificates of 500 shares each, one in the name of W. H. Shearman and the other in the name of John C. Dugan, and to forward same to E. O. Howard, treasurer.

Resolved, that P. B. Locker be and he is hereby authorized to extend the date of the payment for each block of one hundred and fifty thousand (150,000) shares of stock provided in the contract, entered into between this corporation by P. B. Locker, its attorney in fact, of the one part, and Mr. Bernard Desouches, of the other part, dated August 1st, 1910; said extension of time to be limited to a period of forty-five days in the case of each and every payment provided in the said contract; said extension of time to be [230] given provided the

said Bernard Desouches makes a request in writing to the said P. B. Locker that such extension of time be granted and that said request shall provide that such extension of time shall in no way effect or nullify any of the other provisions or terms of said contract, or terms.

On the last resolution, the vote was as follows: Ayes: Messrs. Ferry, Howard and Smith. Mr. Janney not voting, being excused. There being no further business meeting on motion adjourned.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated February 8. 1911.]

Special Meeting of Directors—Feb. 8th, 1911.

A special meeting of the Board of Directors was held pursuant to call and upon waiver of notice at the office of Stephens, Smith & Porter, Judge Building, Salt Lake City, Utah, at 5 o'clock P. M. on Wednesday, February 8th 1911, the following members being present: W. Mont. Ferry, John Pingree, E. O. Howard, Benner X. Smith and John Janney. The following resolution was offered by Mr. Howard, seconded by Mr. Pingree and carried, the vote being as follows: Ayes, Messrs. Ferry, Pingree, Howard and Smith. Mr. Janney not voting, being excused.

Whereas, from a letter recently received from the Windsor Trust Company, it appears that the French bearer certificates have not all been forwarded to France and that other unforeseen delays have re-

tarded the progress of our negotiations with French bankers and rendered it unfair to demand of them payment upon the day and dates specified in the contract entered into between said bankers and this company, now therefore be it

Resolved, that P. B. Locker be and he is hereby authorized to extend the date of the payments of each block of 150,000 shares of stock provided in a contract entered into between this corporation by P. B. Locker, its attorney in fact, of the one part, and Bernard Desouches, of the other part, dated August 1st, 1910, said extension of time to be limited to a period of ninety days in the case of each and every payment provided for in the said contract; said extension of time to be given, provided the said Bernard Desouches makes a request in writing to the said P. B. Locker that such extension of time be granted and stating that such extension of time shall in no way effect or nullify any of the other provisions or terms of said contract.

It is understood that this extension of ninety days is cumulative and in addition to the extension of forty-five days formerly given, and be it further,

Resolved, that P. B. Locker be instructed not to grant the aforesaid extension unless it be imperative to do so and in that case to grant only so much thereof as may seem required under the circumstances, but that said P. B. Locker be allowed full discretion as to whether to grant the extension and as to how much of said ninety days be given.

On motion duly made and carried, it was ordered that $200 be paid to the secretary of the company on

account of salary for four months.

On motion duly made and carried, the following bills were authorized to be paid to W. H. Shearman; $4.90 for bringing abstract of title to company's property down to date and $20 attorney's fee for examining abstract. [231]

On motion duly made and carried the payment of $50 to J. W. Wade under an order from P. B. Locker was approved, and it was ordered that said $50 be deducted from the amount due this company to the said Locker. The following resolution was unanimously adopted:

Whereas, negotiations for a large block of treasury stock of this company in Paris, France, are making satisfactory progress,

Whereas, under the arrangements to sell said stock certain persons in France have a right to be represented at meetings of stockholders of this company and considerable time is required for communications between Salt Lake City and Paris, France.

Whereas, ninety days' notice would be a reasonable time for calling special meetings of stockholders, thus allowing time for notice to reach the holders of French bearer shares, now therefore be it

Resolved that article II of the by-laws of this corporation be amended so as to read as follows:

"The annual meeting of the stockholders, until otherwise provided by resolution of the Board of Directors, shall be held at the principal office of the company at Salt Lake City, Utah, on the second Monday in February of each year at 2 o'clock in the afternoon of said day. Notice of the holding of such

meeting shall be given by the president or the secretary by a written notice to each stockholder of record at least thirty days next prior to the date of the holding of such meeting by mailing to each of said stockholders of record a written notice of the time and place of such meeting and in general terms the business to be transacted thereat, addressed to the last known address of each of said stockholders respectively,

"Special meetings of the stockholders may be called by the president or the secretary upon request of the Board of Directors or upon the request of the holders, as shown by the books of the company, of one-third of the outstanding capital stock. Notice of the holding of such meeting shall be given by the president or the secretary by a written notice to each stockholder of record at least ninety days next prior to the date of the holding of such meeting by mailing to each of said stockholders of record a written notice of the time and place of such meeting and in general terms the business to be transacted thereat, addressed to the last known address of each of said stockholders respectively."

There being no further business meeting on motion adjourned.

(Signed) JOHN JANNEY,
Secretary.

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated May 3, 1911.]

Special Meeting of Directors—May 3, 1911.

A special meeting of the Board of Directors was

held at 12 o'clock noon on Wednesday, May 3d, 1911, at 601 Judge Building, Salt Lake City, Utah, pursuant to a notice. There were present at the meeting W. Mont. Ferry, E. O. Howard and Benner X. Smith. John Janney, Secretary, being absent, Director Smith was unanimously elected to act as secretary of the meeting.

Mr. Smith presented a communication from Mr. Pingree acknowledging receipt of notice of meeting, and stating that he would be unable to be present, which communication was ordered filed. The written resignation of Chas. Knapp as vice-president and assistant secretary, Thos. L. Zimmerman, Jr., as vice-president and assistant secretary, L. W. Chandler, as assistant secretary, and [232] Geo. L. Eastman as assistant secretary were presented and ordered filed with the record of the company. It was then moved by Director Howard, seconded by Director Smith and unanimously carried that the resignation of each of the above-named officers as presented by said officers be and the same are hereby accepted, and it was further moved, seconded and unanimously adopted that each of said officers be notified at once of the acceptance of their resignations. There being no further business meeting on motion adjourned.

_____,

Secretary *pro tem.*

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated May 20, 1911.]

Special Meeting of Directors—May 20, 1911.

A special meeting of the Directors of the Tenabo

Mining & Smelting Co., was held in the office of Stephens, Smith & Porter, 601 Judge Building, Salt Lake City, Utah, at 11:3 A. M. on Wednesday, May 20th, 1911, pursuant to call regularly made, the following directors being present: Messrs. W. Mont. Ferry E. O. Howard, Benner X. Smith and John Janney, being the directors elected at the meeting of stockholders held on May 13th, 1911, and each of whom subscribed to the oath of office prescribed by law and then proceeded to the election of officers. The following officers were elected by ballot: W. Mont. Ferry, President, Benner X. Smith, Vice-president, John Janney, secretary, and E. O. Howard, Treasurer.

Report from Mr. Locker as to the progress of his work in Paris, France, was read by the secretary, whereupon it was moved, seconded and adopted that the contract heretofore entered into between this company and Mr. Locker, as appearing of record in the minutes of meeting held on the 5th day of March, 1910, and as modified at subsequent meeting, as appearing of record in the minutes of said meeting be extended so that the same will not expire by limitation of time until ninety days following the date of this meeting. The vote being as follows: Ayes, Messrs. Ferry, Smith and Howard. Mr. Janney not voting, being excused.

The following motion was made by Mr. Howard and seconded by Mr. Smith and unanimously carried.

Whereas, this company has been receiving information as to the progress of his work from Mr.

P. B. Locker at irregular though satisfactory intervals of time, and

Whereas, it is deemed advisable that Mr. Locker report more formally to this company, therefore be it

Resolved, that the president of the company request Mr. Locker to make a stated report on or about the first of each and every month as to the progress of his work up to that time.

There being no further business meeting on motion adjourned.

(Signed) JOHN JANNEY,
Secretary. [233]

[Defendant's Exhibit "L"—Minutes of Meeting of Directors of Tenabo M. & S. Co., Dated June 12, 1911.]

Special Meeting of Directors—June 12, 1911.

The Board of Directors of the Tenabo Mining & Smelting Company met at its principal place of business in Salt Lake City, Utah, on the 12th day of June, 1911. There were present the following directors: W. Mont. Ferry, E. O. Howard, John Janney and Benner X. Smith. Mr. Skeen having failed to qualify.

Whereupon the following resolutions was offered by director Smith who moved its adoption:

Whereas, the Board of Directors has been advised that certain stockholders of this company have commenced an action in the United States Circuit Court for the District of Nevada against this company claiming that in the organization of the company there were certain fraudulent acts and practices, and

also making other claims of which this Board is not fully advised for the reason that a copy of the pleadings has not been served upon this Board, and after diligent effort the Board has not been able up to this to obtain a copy of the same.

Whereas, the object of said action is to have a Receiver appointed for the company, which, if successful, will *probably winding* up of the company and the sale of its property, and

Whereas, under such circumstances and until said action is determined, it is the opinion of this Board that the treasury stock which Mr. Locker is now attempting to sell should not be sold now, therefore be it

Resolved, that pending the determination of said action and until further action of this Board there be no treasury stock or other stock of this company sold and that a certified copy of this resolution be forwarded at once to Mr. P. B. Locker.

Said resolution was then discussed by the Board and put to a vote and adopted unanimously. Whereupon the following resolution was offered by director who moved its adoption:

Whereas, there has come to the notice of the Board of Directors of this company a prospectus mailed at Paris on May 27, 1911, and received at *the* Salt Lake City on the afternoon of June 9, 1911, issued under the name of the Bank Charaire & Company of Paris, France, soliciting the purchase of the French bearer certificates of this company, and

Whereas, said prospectus so issued contains statements which are not founded upon fact, and mis-

representations as to the property of the company and the value of the same, and

Whereas, this company and its Board of Directors do not approve of said prospectus and the statements made therein, and disapprove of said representations and the use of said prospectus for the purpose of the sale of the said bearer certificates of this company, now therefore be it,

Resolved, that the Board of Directors disapprove of the issuance of said prospectus and of the various false statements and misrepresentations contained in the same, and that this Board should not allow any of its treasury stock or bearer certificates to be sold under such representations or any false representations, and that the action of the secretary of the company in sending the following cablegrams be and is hereby approved:

June 1, 1911.

Tenaboms,
Paris.

Defer issuing prospectus until corrected. Will be compelled to refund to buyers if we do not notify them. (Signed) TENABOMS.

June 19, 1911.

Tenaboms,
Paris.

Speedy action is absolutely necessary by stopping stock sales owing to false representations. In order to put a stop to sales orders must be [234] telegraphed in plain language to banks. Telegraph what action has been taken concerning.

June 11, 1911.

Frambank,

Paris.

We do not approve prospectus Chareire & Co. Should follow engineers' reports. Must not dispose of the stock. Refuse to accept money.

Said motion was then discussed and unanimously adopted. On motion it was ordered that a copy of the foregoing resolution be sent to the Franco-Americane Banque and also to P. B. Locker. There being no further business meeting on motion adjourned.

(Signed) JOHN JANNEY,
Secretary.

[Complainant's Exhibit No. 3—Resolution of Directors of Tenabo M. & S. Co.]

Exhibit 3, J. W. C., Examiner.

Whereas, large sums of money are being expended by P. B. Locker in the work of financing the treasury of this company by the sale of treasury stock in Paris, France, $4368.57 being the Windsor Truct Company bill for printing French bearer certificates, of which $2,000.00 has been paid; $1,310.00, $610.00, $410.00 bills for services of vice-presidents and assistant secretaries in signing 45,000 certificates; French taxes due approximating $10,000.00. Trustee fee to Windsor Trust Company, $3,000.00; also attorney's fees for legal advice in Paris, and sundry other incidental expenses; and

Whereas, this company is not paying any part of these expenses but is receiving the benefit therefrom and is therefore interested in the success of negotia-

tions which require expenditures of large sums of money on the part of the said P. B. Locker; and

Whereas, said Locker has advised this company that he can secure a loan from a French bank upon his note, provided he can secure the issue of 50,000 shares in French bearer certificates, and has asked for a loan of the same, offering to secure this company by 70,000 shares of stock of this company which is owned by him and associates;

Now, therefore, be it resolved that this company loan to the said P. B. Locker, 50,000 shares in French bearer certificates for a period of six months, upon the deposit by the said P. B. Locker with the Windsor Trust Company, to the credit of the Tenabo Mining & Smelting Company, as collateral security of 70,000 shares of stock of this, the Tenabo Mining and Smelting Company, upon the condition that the consent to the loan of said 50,000 [235] shares in French bearer certificates be obtained from Mr. Bernard Desouches, 148 Avenue Malakoff, Paris, France, and also from the members of the Underwriting Syndicate, with whom this company has contracts relating to the said stock; and

Resolved, that this company authorize the payment of $25,000.00 to the order of P. B. Locker from the money deposited in the Franco-Americane Banque to the credit of this company, from the sale of the first allotment of 150,000 shares of stock, not, however, until the entire allotment of 150,000 shares aforesaid, has been paid for in full, and upon condition that the said P. B. Locker deposit with the said Franco-Americane Banque, 50,000 shares of stock of this

company as requested by five thousand French bearer certificates of the denomination of ten shares each, heretofore loaned to the said P. B. Locker by Tenabo Mining and Smelting Company, for the purpose of providing funds for expenses and so forth;

Resolved, that the Franco-Americane Banque be and the same is hereby, authorized and instructed to turn over to the order of P. B. Locker, of the Hotel Chatman, Paris, France, and Mr. Bernard Desouches, party of the second part in a contract authorized by resolution adopted March 5th, 1910, five thousand French bearer certificates of the denomination of ten shares each, upon the deposit of the said P. B. Locker with the Franco-Americane Bank, or with the Windsor Trust Company of New York, or part with one and part with the other, a total number of shares which will aggregate 70,000 said shares to be deposited to the order of the Tenabo Mining and Smelting Company.

[Complainant's Exhibit No. 5—List of Stockholders of the Tenabo M. & S. Co., etc.]

Exhibit 5, JWC., Examiner.

List of Stockholders of the Tenabo Mining & Smelting Company, as of the Close of Business, Jan. 12th, 1912.

Name	Address.	No. Shs.
Adams, W. F.,		4000
Adams, E. M.,		40
Adsit, L. M.,		800
Adsit, Charles,		2000
Allen, Sam. H.,		400

Name	Address.	No. Shs.
Allgeri, Anthony,		9800
[236]		
Ball Brothers,		250
Bannister, Thomas,		200
Barker, A. G.,		280
Bates, C. D.,		200
Benson, W. T.,		600
Bloom, William, 62 Summer St., Boston, Mass.,		98200
Brien, H. M.,		500
Browning, Mrs. Alice,		800
Bowman, D. A.,		40
Burke, C. S. T.,		500
Campbell, J. E., c/o H. Tyree, 49 Wall St., N. Y. City,		100
Case, W. A. Logan,		50
Case, Dana Eva,		50
Case, W. A.,		600
Cassidy, John J.,		10000
Childs, H. L.,		40
Clark, W. Campbell, 260 Ogden St., Newark, N. J.,		2000
Clarke, John T., c/o H. Tyree, 49 Wall St., N. Y. City,		100
Clark, C. C.,		200
Conely, R. L., c/o McCornick & Co., Bankers, Salt Lake City, Utah,		500
Cook, Charles H.,		400
Cronee, George,		1600
Cross, F. B.,		200
Critss, A. B.,		200

Name	Address.	No. Shs.
Davis, Emanuel,		200
Davis, Fred C.,		140
Deetrich, Albert,		1000
Donovan, J. J.,		400
Dunn, Blanche L.,		40
Dunton, C. B.,		200
Edwards, H. C.,		4000
Ellerbeck, W. L.,		300
Englehardt, O. A. & M. L.,		400
Falk, Catherine L.,		400
Faust, William H.,		300
Fendall, Thomas M.,		10000
Fendall, Thomas M.,		1000
Fetherolf, N. J.,		160
Fowler, George W., c/o H. Tyree, 49 Wall St., N. Y. City,		89000
Fetherolf, James M.,		240
Fox, J. C.,		400
Gardanier, E. E.,		200
Gem Consolidated Mining Co.,		50000
Grigg, Alfred,		200000
Crimsdell, W. G.,		200
Hallowell, James,		200
Harris, Winthrop & Co., 25 Pine St., N. Y. City,		500
Harrison, Harry,		500
Herbert, Arthur,		500
Hinks, Edwin S.,		1300
Hobbs, P. L.,		5000
Honsman, Frank,		200
Grandy, Sophia,		200

Name	Address.	No. Shs.
Howard, E. A.,	60 Judge Bldg., Salt Lake City, Utah,	100
Humphrey, L.,		2000
Janney, John,	60 Judge Bldg., Salt Lake City, Utah,	100
Jannay, John,		55618
Janney, A. D. P.,		750
Jensen, F. C.,		4000
Johns, Arthur,	60 Wall St., N. Y. City,	44490
[237]		
Jones, Arthur,		40
Kaufman, Edward,		40
Kantor, S. B.,		1000
Kimball, F. D.,	c/o McCornick & Co., Salt Lake City, Utah,	1000
Kinkhorst, Dora E.,		160
Kinkhorst, Adele W.,		160
Klein, Louis,		400
King, N. H.,	c/o H. Tyree, 49 Wall St., N. Y. City,	100
Kelly, P. H.,	c/o H. Tyree, 49 Wall St., N. Y. City,	100
Kelly, Chas. E.,	c/o H. Tyree, 49 Wall St., N. Y. City,	100
Kells, A. R.,		120
Kells, George F.,		200
Kosick, Frank,		200
Kyes, M. W.,		220
La Barge, Sam.,		120
Larsen, O. J.,		400
Le Pelley, Frank,	c/o First National Bank of Chicago, Chicago, Ill.,	100

Name	Address.	No. Shs.
Lee, Miss Mary,		10
Lee, Tatum R. E.,		40
Lerwill, Joe,		400
Lindsay, Mary,		400
Locker & Janney,		2040
Locker, P. B.,		47618
Locker, P. B., Trustee,		14000
Lutz, Samuel,		500
Lynn, R. H.,		1000
McMickael, N. J.,		1000
Machader, Chas. M.,		40
Marsh, W. H.,		1000
Martin, J. R.,		40
Martin, W. C.,		160
Massy, W. A., c/o H. Tyree, 49 Wall St., N. Y. City,		100
Michel, C. E.,		200
Mitchell, Mattie,		1000
Mont, Ferry W., c/o Stevens, Trust & Porter,		100
Moore, B. Walton,		1000
Morgan, Cora,		400
Morris, Henry D.,		500
Mull, Charles H.,		250
Murphy, Robert,		64800
Myton, H. P.,		3360
Mettenstrom, Jno. R., c/o First National Bank, Chicago, Ill.,		200
Nitchke, Fred,		80
O'Neill, A. B.,		100
Olson, George,		400

Name	Address.	No. Shs.
Pacham, J. M.,		1000
Paige, H. Ray,	1122 William St., Hoboken, N. J.,	50
Paxtin, Mrs. R. A.,		1000
Pezoldt, G.,		280
Phelps, Raymond R.,	c/o First Natl. Bank, Chicago, Ill.,	550
Pingree, John,	60 Judge Bldg., Salt Lake City, Utah,	100
Porato, Anton,		400
Powers, O. W.,	c/o H. Tyree, 49 Wall St., N. Y. City,	100
Price, C. S.,	Boston Bldg., Salt Lake City, Utah,	100
Printz, Michael,		200
Raleigh, A. E.,		20000
Reed, F. W.,		80
Weinkling, L. H.,	c/o First National Bank, Chicago, Ill.,	300
Robertson, Nellie B.,		2000
Rockwell, D. L.,		500
Root, Mrs. Clara R.,		2000
Rust, George,		2800
Saacke, Chas. W.,	74 B'way, N. Y. City,	1000
[238]		
Schultz, R. W.,		4000
Schultz, H. P.,		1000
Schweitzer, Louis,		5000
Sharkey, B. A.,	602 W. 116th St., N. Y. City	500
Shoenberg, L. D.,		2000

Name	Address.	No. Shs.
Shepard, Angelina,		750
Shobe, R. C.,		40
Simon, Milton,		1000
Skillern, John, Jr.,		500
Smith, Benner X.,	60 Judge Bldg., Salt Lake City, Utah,	100
Spaeth, Otto,	c/o H. Tyree, 49 Wall St., N. Y. City,	87000
Spalding, J. P.,	c/o McCornick Bros. & Co., Salt Lake City, Utah,	500
Stauffenberg, W. C.,		200
Sullivan, T. J.,		200
Tanner, Mrs. Anna,		2000
Thal, Gus,		200
Trauer, H. R., Trustee,		8000
Tyree, H.,	49 Wall St., N. Y. City,	1000
Tyree, John C.,	c/o H. Tyree,	300
Ulman, Setha A.,	50 Congress St., Boston, Mass.,	1000
Waggoner, George J.,		1000
Walker, M. H., Trustee,		7604
Walker, M. H.,		4000
Wardell, Edward H.,	Bowling Green, N. Y. City,	300
Warmington, D. R.		1000
Wille, Mrs. Fae		800
Willson, Chas. C.,	c/o Continental & Commercial Tr. & Savings Bank, Chicago, Ill.,	500
Wilson, R. C.,	Chicago, Ill.,	500

Name.	Address.	No. Shs.
Windsor Tr. Co., Trustee,	59 Cedar St., N. Y. City,	450000
Wires, Albert, Jr.,		80
Wishan, Ralph,		280
Wood, J. D.,		4000
		1,367,200

List of Stockholders Jany. 12, 1912. Tenabo Mining & Smelting Co., John Janney, Secy. (Seal of Company.) [239]

[Complainant's Exhibit No. 6—Agreement, Dated January 4, 1910, Windsor Trust Co. and Tenabo M. & S. Co.]

TENABO MINING AND SMELTING COMPANY.

STOCK TRUST AGREEMENT.

Exhibit 6

J. W. C. Examiner.

WINDSOR TRUST COMPANY, Trustee.

THIS AGREEMENT, entered into the 4th day of January, 1910, by and between the WINDSOR TRUST COMPANY, of the City of New York, hereinafter called the Trustee, party of the first part; the TENABO MINING AND SMELTING COMPANY, a corporation organized under the laws of the State of Nevada, hereinafter called the Company, party of the second part, ————, as copartners, composing the banking firm of ————, hereinafter called the Bankers, parties of the third part, and the several holders of all stock trust certificates, issued and to be issued hereunder, in accord-

ance with the terms hereof, parties of the fourth part, WITNESSETH:

WHEREAS, the Company is a corporation organized under the laws of the State of Nevada, having an authorized paid-up capital stock of Three Million Dollars ($3,000,000), consisting of Fifteen Hundred Thousand (1,500,000) shares of stock of the par value of Two Dollars ($2.00) each, of which said capital stock there remain in the treasury ——— shares; and

WHEREAS, the Company is desirous of selling its treasury stock for the purpose of providing funds for the further developing its mining properties and erecting reduction plants for the more economical handling of its ores; and

WHEREAS, the Bankers, after satisfactory investigation of the company and its affairs, are desirous of lending their assistance, and to sell for the company a part of this capital stock remaining in the treasury; and

WHEREAS, the Bankers have represented to the Company that the French public is accustomed to certificates of capital stock in the form of certificates issued to bearer instead of certificates registered in the names of the stockholders of record such as are universally issued in [240] the United States, and for that reason have proposed to the Company a plan for the issuance by the Trustee of bearer certificates representing the beneficial interest in shares of the capital stock of the Company deposited with the Trustee, and

WHEREAS, the Company desires to deposit with

the Trustee the certificates representing said shares with transfer thereof in negotiable form and to procure the issue against the same of Stock Trust Certificates as hereinafter provided, and to make provision for the future deposit with the Trustee of other certificates representing additional shares of said stock to be held and disposed of by the Trustee in the manner and for the purposes hereinafter set forth, and against which Stock Trust Certificates shall be issued as aforesaid, and to make provision concerning the right to vote on said stock while on deposit with the Trustee,

NOW, THEREFORE, in consideration of the premises and of the several agreements hereinafter set forth, it is herein agreed as follows:

FIRST: The Company will upon the execution and delivery of this agreement deposit with the trustee for the purposes and on the conditions, herein specified, certificates for not less than Four Hundred and Fifty Thousand (450,000) shares of its capital stock with transfers endorsed thereon or annexed thereto, to said Trustee or its assigns, and upon such deposit the Trustee will in exchange therefor issue and deliver pursuant to the order of the Board of Directors of the Company Stock Trust Certificates with dividend coupons annexed thereto for a number of shares equal to the number of shares represented by the certificates of stock deposited with it as aforesaid, which Stock Trust Certificates and dividend coupons shall be in substantially the following form:

TRUSTEE'S CERTIFICATE.

for

Number ——— shares SHARES

CAPITAL STOCK OF

TENABO MINING AND SMELTING COMPANY.

Capital Stock $3,000,000. Incorporated under the laws of the
Par Value shares $2 each. State of Nevada, U. S. A. [241]

Full paid and non-assessable.

Trust Certificate to Bearer:

The bearer hereof, upon surrender of this trust certificate and all unpaid dividends coupons (issued on account thereof) is entitled to a certificate for ——— shares of Two Dollars ($2) each of the Capital Stock of the Tenabo Mining & Smelting Company, the same having been deposited with this Company in trust for the bearer hereof in accordance with the terms of an agreement dated the —— day of January, 1910, reference thereto being made hereby for a statement of the respective rights and liabilities of the Copper Company, the Trustee and the holder thereof.

On receipt of such dividends declared thereon (from time to time) by the Tenabo

Mining & Smelting Company, the undersigned will, either directly or through Messrs. ——— or their successors, (Paris, France), pay to bearer, according to notice published by it, the equivalent of such dividends upon presentation and surrender of the coupons hereto annexed, corresponding in number to the dividends declared after deducting therefrom an amount equivalent to the transmission and income taxes in France.

New York, ——— 190——

WINDSOR TRUST COMPANY,

By ———————,

Secretary. [242]

(Form of Dividend Coupon.)

On receipt by it from the Tenabo Mining & Smelting Company of Dividend No.—— this Company will pay, according to notice published by it, to the bearer of the coupon corresponding thereto, either directly or through Messrs. ———, or their successors, in Paris, France, the equivalent of such dividend on —— shares of Capital Stock held

by this Company in trust for the bearer of and in accordance with its Trust Certificate No. ——, after the deduction of amount equivalent to the transmission and income taxes in France.

WINDSOR TRUST COMPANY,

By ————————————,

Treasurer.

The Company agrees to execute upon the stock trust certificates to be issued for the share or shares represented by the corresponding certificates of stock so deposited under this agreement with the Trustee, a certificate in substantially the following form, to wit:

1. The Tenabo Mining and Smelting Company hereby certifies that full paid and non-assessable registered certificates equivalent in amount to all bearer certificates of the Windsor Trust Company outstanding, have been deposited with the said Windsor Trust Company for the holder of such bearer certificate.

2. That the said Trust Company has agreed with the undersigned Company that, at his option, the holder of the within bearer trust cer-

tificate may exchange the same, having attached thereto all dividends, coupons, in respect whereof liability shall not have accrued, for a registered share certificate of like amount. An agency will be established in Paris, where application for such changes may be filed and the same [243] will be effected within a reasonable time on the date of filing the requisition and upon the payment of a fee of twenty cents (20¢) for each certificate so exchanged.

TENABO MINING AND SMELTING COMPANY.

_____, _____

President. Secretary.

Memorandum:

After payment of the last coupon on Trust Certificate No. —— for —— shares of the Capital Stock of the Tenabo Mining and Smelting Company, a new coupon sheet, will be delivered to bearer on surrender of the last coupon and of this memorandum.

SECOND: The Trustee agrees further that at any time during the continuance of the Trust under

this agreement it will receive from the Company any additional certificates of stock of the Company standing in the name of it as Trustee or in any other name satisfactory to it, provided it shall be in negotiable form for transfer of it, as such Trustee and after such transfer will hold the same subject to this agreement, and in exchange therefor will issue stock trust certificates in the form aforesaid for the number of shares represented by the said certificates of stock so deposited with it.

The Trustee agrees further that when all the dividend coupons annexed to any stock trust certificate issued by it hereunder shall have become due and proper provision shall have been made for the payment thereof, it will, upon presentation to it of the memorandum or "talon" attached to such stock trust certificate, together with such stock trust certificate itself, attach to said stock trust certificate a new coupon sheet which the Company agrees to provide for the payment of further dividends when declared by the Company upon such stock in the same form as above set forth.

Whenever a mutilated stock trust certificate issued hereunder shall be surrendered to the Trustee, the Trustee in exchange therefor upon request of such holder, and on payment of the sum of fifty cents [244] for each new stock trust certificate, will issue a new stock trust certificate, with coupons for unpaid dividends, the agreements herein on the part of the Trustee and the Company with respect to the execution and delivery of stock trust certificates being hereby made to apply to such case.

THIRD: In case the officers of the Trustee or of the Company who shall have signed and sealed any of said stock trust certificates or the agreement of the Company thereon endorsed shall cease to be such officers of the Trustee or of the Company respectively before the said stock trust certificates so signed and sealed shall be actually delivered by the Trustee, such certificates nevertheless may be issued, authenticated and delivered as though the persons who signed and sealed the same had not ceased to be officers of the Trustee or of the Company.

The coupons to be attached to such stock trust certificates shall be authenticated by the engraved signature of the Treasurer or any future Treasurer of the Trustee and the Trustee may adopt and use for that purpose the engraved signature of any person who shall have been such Treasurer, notwithstanding the fact that he may have ceased to be such Treasurer at the time when such stock trust certificates shall be actually delivered.

The certificate inscribed by the Company on the Trustee's certificate shall be authenticated by the engraved signature of the President and Secretary of the Company or any future Secretary and President of the Company, and the Company may adopt and use for that purpose the engraved signature of any persons who shall have been either Secretary or President of the Company, notwithstanding the fact that they may have ceased to be such Secretary or President at the time when such stock trust certificates shall have been actually delivered.

Before delivering any stock trust certificates, all

coupons thereon representing dividends which have already been paid by the Company shall be cut off and canceled by the Trustee.

The aggregate of the stock trust certificates issued and outstanding hereunder shall at no time represent more than the aggregate number of shares represented by the certificates of stock deposited with [245] and then held by the Trustee hereunder.

The Trustee or the Bankers may deem and treat the bearer of any stock trust certificate or any coupon thereunto belonging as the absolute owner of such certificate or coupon for the purpose of receiving payment thereof and for all other purposes whatsoever, and neither the Trustee nor the Bankers shall be affected by any notice to the contrary, but nothing herein or in said stock trust certificate shall prevent said Trustee from requiring proof of such ownership.

FOURTH: The Trustee hereby agrees, subject to the provisions of Article Fifth, that on and prior to the —— day of ————, 19—, upon surrender to it for such purpose of any stock trust certificate, with all coupons attached thereto belonging, representing undeclared dividends issued on account thereof and payment by the holder of Twenty Cents (20¢) for each certificate so presented, it will deliver to the individual, surrendering said stock trust certificate out of the certificates of stock deposited under this agreement, certificates of stock for the number of shares of stock of said Company of the par value of Two Dollars ($2.00) each, named in the stock trust certificate thus surrendered. The right to proof of ownership may be reserved to the Trustee

in its discretion as aforesaid. All stock trust certificates so surrendered shall be cancelled by the Trustee and by the Company.

Until the actual transfer of certificates for shares in exchange for and upon surrender of stock trust certificates issued hereunder, the Bankers shall possess and shall be entitled to their discretion to exercise, in respect of any and all shares deposited hereunder, all rights including the right to vote thereon for every purpose, and to assent to any corporate act of said Company, as though they were the absolute owners of said shares. It being expressly stipulated that no voting right passes to others by or under any of said stock trust certificates or by or under this agreement; and upon request of the Bankers, from time to time, the Trustee shall execute or shall cause to be executed and delivered to them or to their nominee or nominees, unrestricted proxies entitling or authorizing the Bankers or their nominee or nominees to vote upon said stock as aforesaid. [246]

FIFTH: If a dividend upon any of the stock represented by any stock trust certificate issued and outstanding under this agreement shall not be called for within six years after the same shall have been paid to the Trustee, such dividend shall be returned by the Trustee to the Company, which thenceforth shall hold the same free and discharged of any legal claim in respect thereof. Provided, however, that the Trustee may cause advertisement of at least twice in each week for four successive weeks to be made in a daily paper published in New York, and also in a paper published in Paris, France, before being re-

quired to return any such dividends.

Except with the consent of the Company, no holder of any such stock trust certificate outstanding after the expiration of the French "abonnement" license thereof, shall be entitled to derive or to receive any dividend or other benefit in respect of any stock represented by such stock trust certificate then outstanding but not presented for redemption under this agreement; and the holder of every such stock trust certificate surrenders and transfers to the Company his rights as above indicated, from and after the expiration of such terms of six years, and twenty years, severally and respectively.

SIXTH: The Bankers are hereby appointed agents for the following purposes, to wit:

(a) To notify the proper authorities of the Paris Stock Exchange of the dates of payment of the coupons annexed to the outstanding stock trust certificates, as also of the gross and net amounts of the dividends to be paid upon each share represented by the stock Trust Certificates upon surrender of the coupons representing same, and this notification shall be full publication as required in said certificates.

(b) To notify the holders of such stock trust certificates of the dates of payment of the coupons annexed thereto, in their order, as provided in said stock trust certificates.

The Trustee shall not be responsible for the acts or omissions of such agents who are hereby accepted as such agents by all certificate holders and by the Company. **[247]**

The Banker hereby accepts such appointment and agrees duly to furnish the notices provided for by this article.

The Trustee will receive such sums as may be paid to it as dividends upon all shares of stock of the Company deposited with it hereunder and standing in its name, from time to time, and thereupon it will promptly distribute the same *pro rata* to and among the holders of stock trust certificates issued hereunder, as provided in said stock trust certificates and the coupons thereto annexed, upon presentation and surrender of the proper dividend coupons thereto annexed, but only after deduction of the French transmission and income taxes with respect to each share of stock as against which such coupons are issued and presented, and upon said Trustee receiving proof that all transmission and income taxes in France with respect to all stock deposited hereunder and subject to "abonnement" in France have been paid for the quarter approximately next preceding the date of payment of such dividend. Original or duplicate original receipts from the French Government showing such payment shall be sufficient proof for the protection of the Trustee against any and all persons.

After the receipt by it of the joint written request provided for by Article Ninth hereof the Trustee shall not be required to distribute dividends except as provided in said Article. In the event that the Bankers should fail to perform any obligation by them assumed in this agreement, or in any other agreement between them and the Company, then the

Company may by resolution of its Board of Directors, appoint other Bankers in Paris, France, as their successors and upon acceptance by the successor Bankers of the appointment said successor shall become vested with all the rights, duties and obligations of their predecessors under this agreement.

SEVENTH: The Trustee, however, agrees that in case at the time of the receipt by it of any dividends upon the stock of the Company standing in its name as Trustee, it shall hold shares in respect of which no stock trust certificates shall have issued, it will repay to the Company so much of such dividends as represent dividends declared upon any such shares. [248]

EIGHTH: The Company or the Trustee may terminate this agreement as to the Trustee on sixty days' notice to that effect to be given by either to the other, as the case may be, and to the Bankers. In case at any time a vacancy shall thus be created in the office of Trustee, a successor Trust Company may be named as Trustee by the joint written appointment of the Bankers and the Company, which appointment shall be filed with the successor Trust Company and upon the acceptance of such appointment by the successor Trust Company it shall be clothed with all the powers given the Trustee hereunder, and upon the trusts of this agreement. Any new trustee appointed hereunder shall execute, acknowledge and deliver to the Trustee an instrument accepting such appointment hereunder, and the trust by this agreement created, and thereupon such new Trustee shall without any further act or deed become

vested with all rights, powers and trusts of its predecessors in the trust hereunder with like effect as if originally appointed.

NINTH: As a condition precedent to the acceptance of the Trust by the Trustee, it is further stipulated and agreed by and between the parties hereto and all present or future holders of the stock trust certificates issued and to be issued hereunder, as follows:

The recitals contained herein, and in the stock certificates or in the stock trust certificates as to due authorization or issue or any other matter whatsoever, are made by and on the part of the Company, and the Trustee assumes no responsibility for the correctness of the same.

The Trust Company shall be under no obligation to see to any record, registry or filing of this indenture which may be necessary or desirable, and shall receive from the Company reasonable compensation to be agreed upon between it and the Company for all services rendered by it in the execution of the trusts hereby created.

The Trust Company shall not be responsible in any manner whatsoever for the recitals herein contained, nor for any statement of fact herein made, nor for the acts of the Bankers or their successors, nor shall it be responsible for the validity of any stock received by it [249] hereunder, nor liable in the event that such stock, or any part thereof, be not fully paid and non-assessable, nor in any event shall the Trustee be individually liable as a stockholder or as the owner of any stock deposited hereunder, its

interest therein being merely that of Trustee. In no event shall the Trustee, notwithstanding anything otherwise contained herein, be personally responsible or liable for any tax or government charge of any kind with respect to any transaction whatsoever hereunder. The Trustee shall be fully protected in relying upon any information or advice from the Bankers respecting such taxes or governmental charges and the Bankers shall be solely responsible therefor to certificate holders and others.

The Trustee shall not be responsible for the genuineness of any of the signatures which may be endorsed upon the stock trust certificates or any agreement annexed thereto or endorsed thereon, nor for the authority of the officers purporting to execute such agreements, save only those of its own officers. It shall be under no liability for accepting or acting under any paper received by it purporting to be duly executed and believed by it to be genuine.

The Trustee may advise with legal counsel, and any action under this indenture taken or suffered in good faith by the Trustee in accordance with the opinion of counsel shall be conclusive on the Company, the Bankers and on the holders of all stock trust certificates, and the Trustee shall be fully protected in respect thereto.

The Trustee shall be protected in acting upon any resolution, notice, request, consent, certificate, affidavit, voucher or other paper or document believed by it to be genuine, and to have been passed or signed by the proper party.

All questions concerning the terms, provisions and

effect of this agreement and of the certificates issued hereunder and the rights of the holders thereof, shall be exclusively construed and determined according to law in the United States of America and be adjudicated by the proper tribunals thereof, and while each of said certificates and of the dividend coupons are in both the English and French languages, [250] the English forms shall prevail in construction.

TENTH: The Trustee shall deliver stock trust certificates hereunder in conformity with written instructions to be given it by the Company in a resolution of its Board of Directors and shall pay all dividends to holders of such certificates directly at its office in New York or through the Bankers in France.

ELEVENTH: This agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the corporations parties hereto have respectively caused these presents to be executed in triplicate original by their proper officers and their corporate seals to be hereunto affixed, and the Bankers have subscribed their names hereto, and the parties of the fourth part have expressed their assent thereto by accepting such stock trust certificates issued hereunder in manner and form as above provided, the day and year aforesaid.

WINDSOR TRUST COMPANY,

By ————————.

THE TENABO MINING & SMELTING COMPANY,

By ————————. [251]

State of New York,
County of New York,—ss.

On the —— day of ————, in the year one thousand nine hundred and ten, before me personally came ————, to me known, who, being by me duly sworn, did depose and say that he resided in ————; that he is the ———— of the WINDSOR TRUST COMPANY, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

State of ———,
County of ———,—ss.

On the —— day of ————, in the year one thousand nine hundred and ten, before me personally came ————, to me known, who, being by me duly sworn, did depose and say that he resided in ————; that he is the ———— of the TENABO MINING AND SMELTING COMPANY, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. [252]

[Complainant's Exhibit No. 8—Statement of Account of Tenabo M. & S. Co. with Utah National Bank of Salt Lake City].

EXHIBIT 8.

THE UTAH NATIONAL BANK OF SALT LAKE CITY.

Sheet No. 1. Account No.

Name—Tenabo Mining & Smelting Co.

Address—105 Mer. Block.

Date.	No.	Item.	Checks.	Deposits.	Totals.	Balance.
1909.						
Ap. 20.				1425		1425.
21.			1140.			285.
May 10.		Ck. Book	1.50			283.50
11.				262.50		546.
14.	2		210.			336.
28.	4		81.09			254.91
June 25.	3		70.23			
	5		1.			183.68
July 7.	6		15.55			168.13
Sept. 16.	7		3.75			164.38
27.		Tel. to E. S. Mendels.	.75			163.63
Oct. 25.	8		6.65			156.98
30.			1.76			155.22
Nov. 20.				24551.40		24706.62
22.		Tel.	1.05			24705.57
30.	10		18860.			
	13		550.			5295.57
Dec. 1.	15		550.			
12.			700.			
17.			107.50			
9.			160.30			
14.			550.			3227.77
2.	11		1025.45			2202.32
4.	18		200.			2002.32
9.	19		80.			1922.32
10.	16		81.15			1841.17

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EXHIBIT 8.

THE UTAH NATIONAL BANK OF SALT LAKE CITY.

Sheet No. 1. Account No.

Name—Tenabo Mining & Smelting Co.

Address—105 Mer. Block.

Date.	No.	Item.	Checks.	Deposits.	Totals.	Balance.
13.		Tel.	.72			1840.45
17.		Tel.	.55			1839.90
20.	20		319.			1520.90
20.	21		481.			1039.90
29.			.96			1038.94
30.	23		50.			988.94
1910.						
Jan. 3.			1.75			987.19
4.	22		50.			937.19
10.	24		1.55			935.64
13.	25		75.			860.64
17.			1.50			859.14
Feb. 1.	29		50.			809.14
3.	30		50.			759.14
4.	27		1.			
	28		38.45			719.69
		2/8 Statement.				
5.	31		2.45			717.24
9.	33		2.			715.24
		Telegram	.75			714.49
21.	38		256.			458.49
23.	36		2.75			
	37		144.			311.74
Mar. 5.	34		25.			286.74
"	35		1.75			284.99
12.	32		110.			174.99
16.			1000.			1174.99
24.	43		550.			624.99
25.	45		50.			574.99
30.	44		50.			524.99
31.	40		6.			
	50		15.20			503.79
"	41		3.50			

EXHIBIT 8.

THE UTAH NATIONAL BANK OF SALT LAKE CITY.

Sheet No. 1. Account No.

Name—Tenabo Mining & Smelting Co.

Address—105 Mer. Block.

Date.	No.	Item.	Checks.	Deposits.	Totals.	Balance.
	51		150.			
	48		50.			300.29
Apr. 1.	47		50.			250.29
4.	46		50.			200.29
May 26.	52		50.			150.29
31.	53		5.			145.29
Jun. 6.	55		3.			142.29
8.	54		8.10			134.19
21.	56		14.06			120.13
30.	57		10.			110.13
10/11.	58		20.50			89.63
11/15.			4.45			85.18
12/5.			28.50			56.68
1911.		Statement 1/5/11.				
1/5.			12.			44.68
Jan. 9.	1911		.75			43.93
2/10.			14.			29.93
13.			1.			28.93
14.			10.34			18.59
20.			2.60			15.99
21.			1.85			14.14
26.			4.07			10.07
		Statement May 8–1911.				
May 11–1911.			7.25			2.82
20.			10.		(In red)	7.18
22.						
					7.18	Closed.

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Complainant's Exhibit No. 13 [Letter Dated November 29, 1910, P. B. Locker to John Janney].

"9, rue Pillet Will, Paris,
November 29, 1910.

John Janney, Esq.,
105 Mercantile Block,
Salt Lake City, Utah.

Dear Janney:—

I have been very busy getting an office for the Company, holding a meeting of the Underwriters to elect the Managing Committee for the Syndicate, which together with the other work that I have had to do has kept me from writing for a few days.

I will have the attorney, Mr. Picard, write you a letter explaining the present situation here, and I will have the Manager of the Banque-Franco-Americaine write you a letter, telling you who the Underwriters are and I will try to give you a full and complete idea of the present situation.

I am just in receipt of a letter from Mr. Beardsley of the Windsor Trust Company, copy of which I enclose herewith, which shows that we have no certificates yet, but are likely to get them in a few days. You can readily appreciate what difficulties I have had to contend with in keeping the people in line who expected the certificates in the early part of October and now we shall only get them in December.

This delay has necessitated my extending the option and the time of payment of the Underwriters until February 15th. This is within the limits of my contract, and I do not suppose that it is necessary to

have a special resolution of the Board of Directors in this matter. In order to make this change, and to be within the limits of the law and not be liable to a fine for placing shares in France before we had obtained the permission of the Government so to do, we were obliged to change the date of the contract with Bernard Desouches and see the Underwriters and have them change their underwriting agreements. Some would not sign again and we had to secure new underwriters.

All of this has been a very great deal of worry, but I have met it and was congratulating myself on having gotten matters into a [256] very good shape, when I was called to the Bank and shown a copy of your Resolution for the delivery of the certificates of stock. I have not felt discouraged at any time, until I received this information. We had arranged for advertising and had secured a man who would endorse my notes for the money, provided we were paid from the first frs. 150,000 that came in. I had represented that instructions would come from the company to deliver the shares against the payment of frs. 7—and to pay to the managing committee of the Underwriting Syndicate the first frs. 150,000. After having met all the other conditions and then having to face the instructions which were sent by the Company, instructions which were not in conformity with my instructions sent with the contract, which they had evidently approved, needless obstacles placed in my way.

With the instructions which you have sent, how do you expect me to convince any one, that you will pay

the first frs. 150,000 as per the contract with Desouches?

The next question is, do you expect to pay it? If you do not expect to pay it, why do you deliver any certificates at all? If you made a contract with me to advance $15,000,—while the only price which you were getting for the shares was fifty cents, and it would take 30,000 shares to make $15,000, whereas it takes only 21,000 shares to pay the 150,000 francs; why do you not send the instructions to pay over to the managing committee the first frs. 15,000?

Do you realize that I have gone to my limit in providing cash to pay the expenses of the Tenabo Mining & Smelting Company? Do you realize that I am personally responsible for more money in the Tenabo than any one else is? And yet, here I am, confronted with this condition where it requires the length of time necessary to get you a letter and have a reply sent back with the signatures of the officers to an order before the bank can act.

What is the use of my having to worry over this? Just a little thought should have convinced the Board of Directors that they should have given some evidence that the first money would be paid out as [257] per the contract with Desouches. It is impossible for me to wait until I can get your signatures, but how I am going to meet this condition now, is more than I know. I will do it in some way or other.

I will have the attorney send you the originals of the contracts and instructions as to the method and manner of the payment of the money that may be

placed to the credit of the Company.

I know that you have done your best in this matter and I regret that the Board of Directors could not see their way clear to make my path a little smoother instead of erecting obstacles for me to overcome.

Very truly yours,

(Signed) P. B. LOCKER.

New York, Nov. 18, 1910.

Mr. P. B. Locker,
Hotel Chatham, rue Daunou,
Paris, France.

Dear Sir:—

We beg to advise you that 2000 of the nominative certificates have been delivered to us by the printer and are now being signed up. We expect same will be completed tomorrow or Monday, so that we can immediately proceed with the issuing of the French bearer certificates when they come from the printer, which, we hope, will not be later than Monday or Tuesday of next week.

You may rest assured that we will do everything in our power to expedite the forwarding of the French Bearer Certificates in accordance with your wishes and regret that so much time has been consumed in completing the transaction, but the work entailed has been great.

Very truly yours,
T. E. R. BEARDSLEY,
Trust Officer." [258]

Complainant's Exhibit No. 14 [Letter Dated December 5, 1910, P. B. Locker to John Janney].

"9, rue PILLET WILL, PARIS.

December 5, 1910.

John Janney, Esq.,
105 Mercantile Block,
Salt Lake City, Utah.

Dear John:—

I am in receipt of the two resolutions: First authorizing the payment of the frs. 150,000 to the Managing Committee and the Second authorizing the payment of certain sums, to be approved by me, to Coleman, Iselin, Kroll & Ballin.

This arrangement is very good and very satisfactory to me. There have been certain advances made against commissions due to Ballin which will have to be deducted out of the first proceeds accruing to his credit; and the same with Kroll and Iselin because of subcontracts they made, and it could be held in no other way than by having the Bank pay up to the total sum of frs. 2 to my order.

Your forethought in protecting me in the matter of commission is a very good idea.

Mr. Picard will write you fully on the condition of affairs here. You will receive a list of the subscribers and comments by Mr. Coleman as to their financial standing. I am inclined to think that we shall be able to place the whole 450,000 shares with proper energy and effort. This will be a very satisfactory day for both you and me.

It has been necessary to take an office here in order

to have a meeting place for the Underwriters, from which agents will start in their canvassing and for general appearance sake in promoting shares. The rent of the office is 4,800 francs per an. The furniture in the office cost frs. 2,500. I bought it from the people who went out.

It would be a good idea to have what mining pictures you can secure sent here to hang on the walls. The one of the Utah Copper Co. would be good. If you can get one of the Rio Grande Railroad, which shows some of the high mountains and the railroad curves, it would also be interesting; in fact, you might, with a little effort get half a dozen [259] pictures that would be good to frame and hang on the walls here, to give an idea of that Western country and to bring in mining scenes wherever possible. A bird's eye view of Salt Lake would be good; some of the American Smelting & Refining Co's. Works; but you know as well as I do what would be interesting and suitable. It may cost a few dollars, but the expenditure is justified. Don't delay in this, but send them at as early a date as possible, for the time we need them will be when possible subscribers will be coming to the office.

We expect within the next few days to make an alliance with *two big banks* of good placing power who will father the issue to be made. I think the deal will go through and if so, it will be a great assistance to our present force.

In the matter of PIOCHE, as I have previously stated, to you, the Syndicate of bankers is placing railroad bonds for the Carnegie Trust Co. of New

York, and expect to be through with the issue by the first of the year, and propose to take up our proposition after January 5th. I don't know that this will materialize, but I have assurances from a number of the Syndicate. If it decides to take the proposition, we will have to act promptly and I will prepare all the data here and send it through for signature as we have made a great many mistakes in preparing Tenabo. The work may be materially lessened and many handicaps removed.

I have agreed with Mr. Hirschmann, one of the members of the Committee of Underwriters, that if the issue is placed, I will invest a certain amount in his bank and form an alliance for the placing of American securities. I believe if Tenabo is successful, that through the Underwriters and acquaintances I have made, we shall be able to form a *connection* here for placing big propositions, bonds as well as shares, and particularly guaranteed bonds.

I note what you say about Raleigh and hope that the statement sent by the attorney and by Coleman will assist you in financing any plan that you may want to carry out for work at Tenabo. **[260]**

I received the plates of the Tenabo photographs all right. We are now arranging the publication of the pamphlets, which will be issued since we now know that the certificates will be here in a few days.

I note the last remark of your letter 'Give my regards to Mr. Kroll and Mr. Ballin.' If you could be on the ground, and could know the position you would say 'Give them anything, but not my regards.' Kroll has proven himself to be an unscrupulous and

unreliable crook of the Russian Jew type, so if you have any communications from him, refer them to me, or use a very careful reply to anything that he may ask.

Mr. Ballin has been ill since his paralytic stroke in the summer and because I gave him money in the spring, he feels that he is to have me support him and though he is unable to do any work, he demands a commission as well as advances that would stagger a Rockefeller. So you see, I am not having smooth sailing here, and for all the difficulties you have, just add on ten and you will know how I feel. But I am in good spirits this morning, and my forecast is 'success.'

With best wishes,

Yours sincerely,

(Signed) P. B. LOCKER."

Complainant's Exhibit No. 15 [Letter Dated April 7, 1911, to John Janney].

PARIS, April 7, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City, Utah.

Dear John:—

The mails have been delayed so that I have just received your letters of March 12, 22 & 23d.

In yours of March 21, you tell me about Edwards, King Fuller & Co. I have already explained to you in a previous letter the steps taken to furnish information concerning them. I will immediately take [261] the matter up now with the view of locating and determining the responsibility of these

people in Paris, and will cable you results. If they can carry out the plan proposed, you had better accept it.

Referring to your letter of 22nd, I appreciate the importance of your knowing accurately the facts concerning the proposition here. It may seem strange to you that a man cannot give you a definite and specific statement of what will or will not be done. If I knew this myself, I would know just what to do. I have endeavored in previous letters to tell you the impressions in my mind at the time of writing. I may not have been specific in each detail, but in general I have given you the ideas.

I note the enclosed memorandum and will review the facts stated to you.

There was no money paid by the underwriters at the time of making the subscription. This was a great mistake, but it was done on the advice of Coleman in the Banque Franco-Americaine and others who said that the only way to secure our underwritings was to move without collections. If I had it to do again I would not accept any underwriter who did not pay at least 25% in advance.

The amount of money deposited and the people who have deposited it are as follows:

	Amt. subscd.	Frs.
DOBB.	7,500	5,250
COLEMAN.	2,500	7,000
d'ANISY.	3,000	5,000
ISELIN.	2,000	7,000
PINAUD.	1,000	700
FISHER.	2,000	1,400
LENICQUE.	60	600
		frcs. 26,950

I hope to secure an additional cheque for frs. 7,000 today, with an agreement to pay frs. 7,000 more in thirty days. Also I have the assurance of Mr. Coleman of the B. F. A. that he has two friends who will pay their frs. 7,000 each.

As soon as the campaign of circularizing and work is under *weigh,* I believe that I will be able to collect from additional people, [**262**] making perhaps a total of frs. 250,000.

Several of the underwriters will undertake to place their shares which will be an additional assistance. The bankers with whom the underwriting committee made contracts have refused to go further under the present market conditions. They prefer to resist any legal proceedings against them and to pay what expenses they may have incurred rather than to undertake a campaign under present market conditions, realizing that they have a responsibility to the public and that we need a large sum of money to carry out our plan and with a view of paying dividends. They also realize that Mr. Coleman of the B. F. A. and in fact the underwriting committee it-

self cannot afford to push legal proceedings against them to compel them to work and that by refusing to move they are simply delaying the game and will be ready to go on when the market is better.

You will realize that I cannot wait for this and am turning heaven and earth to get sufficient funds to start a campaign of circularizing and sending agents into the country to sell the shares.

The *100,000 francs* placed in the Bank for advertising is held up in the same manner as the bankers are held up because in placing the money in the Bank it was stated that it was to be expended for publicity under the contract with the bankers. One string being tied to the other you see the predicament I am in. There have been no agents at work yet, there has not been any stock sold outright except the sixty shares which are to be delivered next August with *a view of keeping the shares* tied up while campaign is being made. However, if we have to go to the public there are agents to do it, and in the small way that I have outlined above, it will be necessary to deliver the shares and it will make our future operations in the raising of a large sum more difficult.

However, as it is a question of what is in fashion here, and if copper were to take a rise and a bank undertook to float the shares, they would be placed in a few days. Still, with copper at 11¾ cents, the present depressed conditions on the market here as in N. Y., how can I force the people? You may say "Why don't you force the underwriters to pay?" I find that if I undertake to force them, rather than pay the **[263]** money in for us to expend, they will

pay it in to the Court, which costs me money to undertake to get it out, and which they can keep tied up for three years with little or no expense to themselves. Moreover, the B. F. A. does not want to be connected with a campaign of this kind. The underwriters claim that the spirit of an underwriting, whether it be stated or not, is that an effort shall be made to place shares before the money is called for, and that they will be disposed to pay when we have made a campaign.

I will bring the illustration closer home to you: Suppose a foreigner came to Salt Lake City and had a number of the influential men underwrite a proposition and they discussed the matter among themselves and decided that they would hold up the game, that they would not pay until they saw that the campaign could be successfully conducted. How long do you think they could keep this foreigner tied up in the courts there? The temperament of the people, their ideas of honesty and integrity in business are as different here from what they are in Salt Lake City as night is from day.

You ask what are the reasons for the dissatisfaction of the underwriters? A Frenchman never takes a chance; he went into this, believing that profits were certain and when you want to touch his pocket he needs no reasonable excuse to refuse, in fact thinks no other excuse is necessary, but merely throws up his hands and says: "I don't want to do it."

You ask are the matters serious? Yes, they are very serious: expenses are going on; we must provide

an amount of cash and we have no time to wait. If I were in a position to say "Yes, we will wait, and, at an opportune moment, we will place the shares," they would all agree with me, and when public feeling changed, they would all pay for their stock. You may get a very few people to buy, but could you now place a mining proposition on the market in N. Y.? What would they say to you if you were there?

This is what I am undertaking to do to overcome the difficulties. [264]

To raise as much money as I can, to prepare circulars and data, and by using the name of a bank here, get agents to go to the people and to send out circulars to about 100,000 people who are either correspondents or customers of the B. F. A. who have agreed to give me a list of these names. The money that has been put up is of course within the first 150,000 francs for expenses and by using this part I hope to sell sufficient shares to relieve our financial distress. To do this I must have shares released from the B. F. A. and must sell these shares.

I know that you have troubles there, but can you imagine the difficulties that I have to finance myself and carry on the necessary expenses here?

I have placed before you the cold hard facts as they exist, but I have not lost courage, nor have I any doubt but that I * * *

Complainant's Exhibit No. 16 [Letter, Dated June 9, 1911, P. B. Locker to John Janney].

Paris, June 9, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City, Utah.

Dear Janney:

Following my letter of Tuesday, we have now gotten about 50,000 circulars into the hands of the public. Replies are beginning to come in from the public and in addition to the forces which the Banque Chareire has working on this proposition, I have secured good men to visit the bankers in the Provinces and solicit their aid in placing the shares.

Ten thousand francs came in yesterday and I am expecting a few more thousands before the close of the week from people whom I know, not taking into consideration what the Banque Chareire may accomplish.

Conditions seem to be improving a little here and we may begin [265] a campaign of publicity, at an early date, in the form of newspaper articles. It is a question of moving within the limit of my means and this is determined from day to day. In order to provide the excess funds for the publicity in the journals, I may have to ask the release of a number of shares as we counted doing some time since. If so, and if it be urgent I shall cable you and the instructions in previous letters will indicate the line I shall want followed. Some of the banks which have their own papers are writing articles in them as

shown in the paper sent you by this mail.

I have no time to write further today, as a man with whom I have an appointment has arrived and I have others all the day till closing time, so will continue next mail day.

Very faithfully yours,
(Signed) P. B. LOCKER.

Complainant's Exhibit No. 17 [Letter, Dated June 20, 1911, P. B. Locker to Tenabo M. & S. Co.].

Paris, June 20, 1911.

Tenabo Mining & Smelting Co.,
105 Mercantile Block,
Salt Lake City, Utah.

Dear Sirs:—

Following my letter of the 13th inst. I decided to undertake to form a new syndicate to purchase the shares from the Tenabo Mining & Smelting Co. I have made progress in this and hope within the next few days to complete the Syndicate which will be formed to purchase 40,000 shares outright and to have an option on the remaining shares.

The contract of option to this syndicate will state that I have given to them the reports of Messrs. MacVichie, Brown, Gillette, L. Humphreys and Weston, that they have reviewed same and that they purchased the shares on the representations contained therein. You have nothing to do with it beyond that point, if they exercise their option. It is not your affair whether they sell them or keep them. [266]

This is about the only way that I see to get out of the situation that has been created by your telegram to the Banque Franco-Americaine.

You will no doubt follow my instructions upon receipt of my letter and will release to my order the 25,000 shares asked for.

This condition will make it possible to write new prospectuses in order to make the corrections that may be outlined in the communications which you are no doubt sending to me.

Very truly yours,
(Signed) P. B. LOCKER.

Complainant's Exhibit No. 18 [Letter, Dated June 30, 1911, P. B. Locker to John Janney].

Paris, June 30, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City, Utah.

Dear Janney:

I am in receipt of your letter of the 9th inst. and also of your various telegrams. On the 27th I sent you the following:

> "Have you sufficient money—to be represented—Carson—If it is absolutely necessary—can bo*ll*ow—$400—telegraph requirements—will remit by telegraph—no shares were taken (by) upon the representation (that)—Prospectus—the necessary plans are now being made—for—new—campaign business is in excellent condition—instruct ..... to deliver B. F. A.—2500—in accordance with our request—or withdraw at once—telegram—B.F.A.—enable us—operate—Desouches—contract—promise will be faithfully kept."

and on the 29th I cabled you through the B. F. A. $400, which with the exchange here amounted to frs. 2.117,40, which was in reply to your cable "Remit at once it is necessary."

You will realize that I had to get this money loaned by people who have paid into the syndicate and who are awaiting my delivery to them of the shares of stock that they have purchased. I thought that this $400 might help you out and I had to go to extreme measures to provide [267] it.

I must make clear to you that people have paid in their money on account of the Underwriting Syndicate, a part of which money has been applied on the expenses incurred in accordance with the terms of your agreement with Bernard Desouches which provided that the first 150,000 francs that came in were to go for expenses. At seven francs per share this requires 21,430 shares.

I want to ask this question: Is it possible for the Company now to make up its mind not to deliver these 21,430 shares when the amount of money has been expended in the interests of carrying through this project?

Can the Company make up its mind not to deliver 75,000 shares of stock, provided it receives its net for that amount in accordance with the contract given to me?

If the Company can change its attitude and decide not to deliver these shares and has still permitted me to spend the money in the interests of its flotation where am I to get the money to return to the people who have bought shares?

It seems to me that whatever attitude may be taken in America, they must deliver to me these 75,000 shares of stock which were sold by me to the underwriters, for the delivery of which I have the right to insist.

I can see no excuse whatever for their holding me up. I am not responsible for conditions that may arise other than to have a clear and distinct understanding with the person who purchases my shares as to their value as indicated in the reports on the properties of the Co. made by Messrs. MacVichie, Brown, etc. You have shares for sale and you want a purchaser. If that purchser reads your report and says. I will buy your shares on the representations contained in these reports, and you will sell them to him, you have nothing further to do with it.

I have taken the steps indicated in your telegram and after the receipt of same, I saw to it that no orders should go to the B. F. A. [268] There were no shares sold as the campaign was discontinued pending the readjusting of the affair and the beginning of publicity to assist the bankers in their placing. I am now at this point: There are three men in Paris who control, to a great extent, the newspapers in France, and have leased to them all the year the advertising columns of these papers. These men have repeatedly refused to enter into any relation with me or the syndicate other than one based upon the payment of cash for the publicity. The campaign of publicity costing 100,000 francs is very little as compared with what many issues have. As it was impossible under the conditions you allowed

me to give more for publicity, I have continued my efforts with the view of arriving finally at the point where they would enter into an understanding with the syndicate to furnish the advertising on a corporation and participation plan, that is, that a certain percentage of the profits made above frs. 7. should go to the press and a certain percentage to the syndicate. I have finally gotten this to the point ready to be signed. These people will not wait. The Syndicate is anxious to sign it and I have delayed signing this contract from day to day by resorting to various means but I am at the end of my rope in that particular, and when you say to me "Don't make a new contract," I must disregard it for I cannot stop now, delay would prove fatal, as no one would take any further interest in the Tenabo M. & S. Co. if I told them that I could not deliver the shares. I may be running my head against a brick wall, but it is like a man who has the flood behind him and it is as well to butt his brains out as to drown, and he stands the chance of his head being harder than the wall! To quit now would cause all of the underwriters to say "Give me back my money." My reply would be "Here are the receipts which the secretary of your Committee has O. K.'d, amounting to over 100,000 francs which money has been expended in the interests of your syndicate. Their next remark would be "Give me the shares that I have purchased." Do you think that I could stand any say: "I won't give you your money and I cannot give you the shares"? To whom do I look to furnish these shares? It can only be to the Com-

pany. To cover the Company I have made two propositions: [269] Release to me 25,000 shares against certificates deposited. I thought that you would deposit your shares, being there, and not necessitate my sending mine through B. F. A. and I told them that I would ship them to you upon the deposit of your certificates, and the release here of Bearer Certificates.

The second proposition was to withdraw your telegram from the B. F. A. and permit the shares, agreed by you, and subscribed for by the Underwriting Syndicate to the extent of 75,000 shares, to be taken up. Up to the present time I have only received this reply: "Don't make any new arrangement." It is not for a new arrangement: it is to carry out old arrangements.

I can see only this to do: Have the Syndicate sign the contracts and keep the machine running: When it comes to the time for them to demand their shares at the B. F. A., I can then cable you to deliver the shares against payment, without responsibility to yourselves other than that incurred by the representations contained in the reports, and the failure on your part to deliver the shares will place the entire burden on the Company, and not on my head, and I will leave it there for the Co. to settle with its creditors for I don't intend to be swamped to any further extent than I am at present by the Company.

I realize full well, Janney, your position, and I feel perhaps more keenly the burdens you are carry-

ing than those that I am myself carrying. You do not realize the attitude of these people here nor do you realize their methods of dealing. I have not intended to say anything in this letter that is a criticism on anyone, but to point out to you the conditions as they loom before me today.

Faithfully yours,

(Signed) P. B. LOCKER. [270]

Complainant's Exhibit No. 19 [Letter, Dated July 7, 1911, P. B. Locker to John Janney.]

Paris, July 7, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City, Utah.

Dear Janney:—

I beg to acknowledge receipt of your cable of this day as follows: "Everything is favorable—the difference is likely to be arranged—will telegraph as soon as—can they promise?—sale is certain—40.000—as per your letter of 20th," and to which I replied as follows:

"In reply to your cable of 6th—can promise—sale is certain—everything is favorable—here—if you think it advisable—for our mutual interests—will sail on—July 12—Salt Lake—must be here not later than—Sept. 1. Answer immediately by W. U. T. Code."

There is nothing new to add to this other than that we have closed the contracts for publicity that will give to us practically the entire press of France and with this there is little or no doubt that we shall be

able to place our entire issue.

We will have the 40 parts completed as soon as I know that I can move ahead. In view of this I have thought that it was perhaps to our mutual interest that I should come to Salt Lake and have a clear understanding of the conditions under which I am operating. Very truly yours,

(Signed) P. B. LOCKER. [271]

Complainant's Exhibit No. 20 [Letter, Dated July 11, 1911, P. B. Locker to John Janney].

Paris, July 11, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City.

Dear Janney:—

I have received your letters of the 24th and 26th. I note that the Company will not deliver the Bearer Certificates in lieu of the nominative certificates that I propose to deposit, and which it has been previously stated to me would be delivered.

Your letter of the 26th seems to crowd in so many of the impossible things that it is hard for me to understand it. It is useless to undertake to analyze this letter for you are too intelligent a man, when you place yourself in my position, not to see the absurdity of it.

At first you state that you are bound by the Desouches contract, then you say Desouches can form a new syndicate just as if it were walking around the corner to take a drink; that it is very easy for him to have 36 men walk down to the Bank and pay

in their $100,000 and stand back and say "Now I will make you give me the shares." You know this country here is just full of that kind of person. Then you go ahead and say that after these people pay in their money and they put agents out and sell the shares, that if a receiver is appointed, that you will hold the money in the Bank and give it back to them, assuming that the agents who sell shares are perfectly willing to work to sell Tenabo shares and if it meets with the pleasure of the Tenabo to give back their part of the money, the said agents will be perfectly willing to return their commissions. You have had enough to do with agents in America to know that you will have them standing in line waiting for such glowing opportunities.

You will also find bankers who are willing to pay the agents their commissions out of their own pockets and then when they have to give the money back to the client they are perfectly satisfied when they have lost the agent's commission as well as their own work. [272]

Then it is very easy for me to have "the underwriters" (whether you mean one or two or all of them or the man who made the contract, or what not, I am not sure), but they can "demand the enforcement of the contract, offer the payment of the money and make a written statement that they will confine themselves to statements of facts as above stated." Janney, do you find underwriters out selling shares of stock? Would you, if you were an underwriter, sign a statement that no agent who went out would state a single thing excepting in the terms in which

you yourself might state it? In fact there are many questions I could ask along this line, but I know it is useless as you know them well enough yourself.

The letters containing the above were received yesterday and this morning I have received a telegram from the Company as follows: "Should not return home—good progress is being made with."

I had made my arrangements to leave to-morrow morning for America as I believed that I could, by talking with the Board of Directors perhaps enlighten them upon some of the points which it seems I have unfortunately been unable to make clear to them in my letters. But after reading this telegram and cancelling my passage and all, I was handed your letter of the 28th and this is the last straw to break the camel's back. You enclose two resolutions, one to me and one that you have sent to the Bank Franco-Americaine and if anything in the world could be more foolish, more unnecessary, than the resolution you send to the B. F. A. then I don't know what it is. You have written them and said that they are not to issue the shares. What do you think the B. F. A. is? A guardian for the Tenabo? What powers have you delegated to the B. F. A.? Only the power to deliver shares against the payment of money: This you have withdrawn, then why do you tell them of the telegram that you have sent me? If there was ever a decided effort to queer your entire proposition, you have certainly sought the most extreme measure. I have explained to you that the B. F. A. was going out of its real scope by becoming the signer of your Trust Agreement. The B. F. A. has nothing to say, has

no power whatever, nor can it direct in [273] any way what is contained in the prospectus.

What would the Company say if the B. F. A. issued a statement or undertook to transact business for you without your authority? Had you first delegated to them the powers of guardianship, then you would be right in sending such a resolution, but otherwise I cannot understand it.

I am thoroughly convinced at this writing that you have closed the doors to any possibility of doing business in France.

I don't believe that the B. F. A. will remain the signer of your Trust Agreement and I look before the day is over to be notified that the Trust Agreement will be cancelled and that they will not do business with you. I am inclined to think that I shall take the boat on Saturday for America, although I may decide to wait until I hear from you with something more definite. I think that I have been treated without consideration and I am thoroughly discouraged and disappointed.

Very truly yours,

(Signed) P. B. LOCKER.

P. S. I wish to have your remarks on the enclosed statements.

Complainant's Exhibit No. 21 [Receipt, Dated July 6, 1911].

Paris, July 6, 1911.

RECEIVED from Mr. P. B. Locker, the sum of Twenty Thousand (20,000) francs, being the first installment made according to the conditions of the contract for publicity entered into this day between

Mr. P. Tricart, representing the Underwriting Syndicate former to aid the placing of the shares of the TENABO MINING & SMELTING COMPANY, and myself, representing the Agence Nouvelle de Publicite.

For the Agence Nouvelle, Administration,
(Signed) PIERRE THIEBAUD. [274]

Complainant's Exhibit No. 22 [Letter, Dated July 11, 1911, P. B. Locker to Tenabo M. & S. Co.].

Paris, July 11, 1911.

The Tenabo Mining & Smelting Company,
105 Mercantile Block,
Salt Lake City, Utah.

Gentlemen:—

I hand you herewith a statement of the expenses that have been incurred by me in the interests of the TENABO MINING & SMELTING COMPANY.

Those who have furnished me the money to meet a part of these obligations and those who have given me credit for the rest have done so because of their confidence in me and I have given my guarantee for the repayment of these sums based upon my confidence in the Board of Directors of the TENABO MINING & SMELTING COMPANY and in my belief that they would act at all times in a fair manner and with full appreciation of the efforts that might be put forth in the interests of their company.

The enclosed statement is not all of the expenses that are necessitated in making the flotation of the shares in France. There is an item of taxes which is guaranteed by the Banque Franco-Americaine and for which they are liable at this time to the French

Government to the extent of perhaps 45,000 francs. There is an additional charge of 10 centimes per share (or one franc per certificate) fee to the Banque Franco-Americaine for the delivery of the shares. Furthermore there are commissions to be paid to several parties who have assisted me.

All of these expenses must be paid from the seven francs per share, the price at which the shares are sold to the Syndicate.

In the placing of the shares with the public, the Syndicate gives one-third of its profits, that is one-third of the difference between seven francs (purchase price) and the price at which the shares are sold, to the Press of France under the advertising contract. It is figured by the Press that this 33⅓% of the profits will amount to at least 450,000 to 500,000 francs. This assures the co-operation of the Press until the shares are all placed. You can realize the advantage of such a contract. [275]

I have sent to Mr. Janney a statement covering the expenses incurred by me personally and not included in the attached statement, but which are nevertheless wholly on account of the Tenabo Mining & Smelting Company. The total amount of the two statements is frs. 238,452,81. At seven (7) francs per share this represents 34,064 shares of stock. For the Banque Franco-Americaine to deliver these shares I must pay the frs. 3406 fee for their delivery, same being fr. 1,—per certificate, as per my arrangement with the Bank.

To make the situation perfectly clear it is this:—

These expenses have been incurred and must be

met. As the Tenabo Mining & Smelting Company has not the money in its treasury, it cannot pay them in cash, but it should deliver shares, as agreed in the Desouches contract, to the extent of frs. 150,000. This does not cover the entire amount and the Company can facilitate the placing of the shares by delivering the total amount of the shares required to cover these items.

The Company can be protected, if it thinks such protection necessary, by allowing the deposit of Nominative Certificates in an amount equal to the number of shares to be released.

I have secured the credit shown in these statements based upon the evidence in the Desouches contract that the proceeds from the sale of the first 21,430 shares of stock, or the 21,430 shares of stock themselves, would be delivered in the liquidation of such claims.

I would like to have the Board of Directors, upon the receipt of this letter, authorize the Banque Franco-Americaine to deliver to my order 34,064 shares and further instruct the Bank to deliver the remaining shares as and when called upon by me, against the payment of frs. 5.— per certificate, the said frs. 5.— to be transmitted to the Tenabo Mining & Smelting Company under the terms of the contract entered into with me.

I will undertake to have all those who have any interest in the Syndicate, or who will sell shares, to have a copy of the reports of your engineers and to the best of my ability will prevent misrepresentations. [276]

I acknowledge receipt of your telegram as follows:

"Should not return home—good progress is being made with."

I will await a telegraphic reply to this letter as to what you propose doing with regard to the delivery of the shares.

Yours truly,

(Signed) P. B. LOCKER. [277]

EXPENSES INCURRED BY P. B. LOCKER.

				Amount.
Windsor Trust Co. Printing Bearer Certfs.				Fr. 22.716.56
Windsor Trust Co. Fees (#3.000)				15.600.
Signing Certificates: Knap	$1310			
Zimmermann	610			
Chandler	370			
Eastmant	410	$2700		14.040.
De Molenes' Fee (per Mr. Picard fr.	1500)			
per Mr. Simonet	1500)			3.000.
Insertion notice in Bulletin An. Jrnl. Official				1.600.
Engineer's letter (Colomar)				62.50
Am. Express Co. shpg. plates for use prospectus				8.20
Recording lease				200.
Office rent (2 mths. Nov. to Jan.)		814.		
1st term 1911 payable advance		1220.65		
2nd " " " "		1220.65		3.255.30
Installation telephone		178.		
Abonnement first quarter Jan./11		100.25		
2nd " Apr./11		100.25		378.50
Larue for brass & marble plates				107.50
Secretarial work Aug. to Nov. 10				
Underwood		fr. 68.		
Rolison		254.		
Fisher		846.80		1,168.80
Amer. Consul legalizing Trust Agmt.				62.40
Amer. Consul legalizing new Trust Agmt.				62.40
A. L. PICARD				12.198.05
Electricity Dec. 1910 frs.	18.60			
Jan. 1911	22.30			
Feb.	18.60			
Mar.	9.15			
Apr.	5.20			72.85
			Frs.	74.533.06

Electric bell mended	9.50
Secretary Nov. 22 to May 22, 1911	2,400.
Office boy Nov. 22 to Dec. 19, 1910	67.
Hiring chairs for Committee meeting	10.
Office boy Dec. 19, 1910 to May 1, 1911	552.
Huot for maps	250.
Concierge tip Xmas fr. 60	
April 29.35	89.35
Telephone garcon before installation of phone in office	20.
Postage and cables	114.70
	78.045.61

I have compared the above amounts with the receipts and find them correct.

(Signed) EDOUARD d'ANISY,
Secretary Managing Committee Underwriting Syndicate Tenabo Mining & Smelting Company,
Proxy for Mr. BERNARD DESOUCHES.

[278]

Copy—Expenses Incurred by P. B. Locker.

In view of issuing and placing the shares of the Tenabo Mining & Smelting Company with the French public under the contract between said company and Mr. Bernard Desouches, to be paid from the 150,000 francs provided for expenses.

May 1 to July 1, 1911.			Amount.
	c/f		78.045.61
June 1, 1911.	Office boy		125.
22,	Secretary		400.
	Commissions Jonquiere		
	1500		
	500		2.000.
	Bocande		3.000
	More	250.	
	Kugelmann print	7900	
	Erhard print	1892	
	Postage	4785	
	Bamburger	100	
	De Thomas	100	
	Dauriac (add. & Env.)	300	
	Didier de la Braie add. & Env.	9.75	
	Stamps circulars	30	
	25 copies Bul. An.	12.50	
	Roneo	252	15.631.25
	Balance publicity contract		84.368.75
	Telephone subscription		100.25
	Miss Ross secretarial work		225.
	Electricity		1.80
			183.897.66

I have compared the above amounts with the receipts and find them correct.

(Signed) EDOUARD d'ANISY,
Secretary, Managing Committee Underwriting Syndicate.

TENABO MINING & SMELTING COMPANY,
Proxy for Mr. BERNARD DESOUCHES.

Complainant's Exhibit No. 23 [Letter, Dated July 13, 1911, P. B. Locker to Tenabo M. & S. Co.].

Paris, July 13, 1911.

Tenabo Mining & Smelting Company,
105 Mercantile Block,
Salt Lake City, Utah.

Gentlemen:

The enclosed is the list of the names and amounts paid to me under the underwriting contract:

Messrs.	Coleman	14.000	
	Pinaud	7.000	
	d'Anisy	5.000	
	Tricart	42.000	
	Desouches	7 .000	
	Moranger	3.500	
	Mars	7.000	[279]
	Fisher	1.400	
	Lenicque	600	
	Dobb	5.250	
	Karamitsas	3.500	
		Frs. 96.250	

Very truly yours,
(Signed) P. B. LOCKER.

Complainant's Exhibit No. 24 [Letter, Dated July 13, 1911, P. B. Locker to Tenabo M. & S. Co.]

Copy.

Paris, July 13, 1911.

Tenabo Mining & Smelting Company,
105 Mercantile Block,
Salt Lake City, Utah.

Gentlemen:

Since writing to you two days ago, I have been

thinking the matter over and trying to figure out some way by which the company would be fully protected and at the same time to outline a plan of procedure that would meet the conditions here and make it possible for me to move.

That you may be thoroughly acquainted with the various steps taken I enclose the following data which is self-explanatory.

1. Contract with Mr. P. Tricart, representing the Syndicate which contract is proposed to replace the Desouches contract.

2. The form of underwriting to be signed under this contract.

3. The proposed advertising contract.

4. Receipt for frs. 20,000 paid under this contract. This together with the personal guarantee of Mr. P. Tricart was accepted by the advertising agency and by this we are bound for the payment of 75,000 francs.

5. Statement of the names and amounts paid to me by subscribers. To put into execution a plan to carry into effect the intention of these contracts under the conditions here, I suggest the following:

The function of the B. F. A. is only as follows:

(a) To deliver shares under the written instructions given by you.

(b) To pay dividends as provided in the trust agreement.

(c) To stand guarantee to the Government for the taxes of the company. (As previously stated to you, the B. F. A. is liable at this time to the Tax Dept. for at least 10% of our taxes and perhaps for more).

Further than the above and the other clauses in the trust agreement [280] relative to publications and so forth, it is understood that the B. F. A. has no other responsibility.

As compensation for the above, they are to receive: (a) Fr. 1. per certificate of 10 shares on each certificate delivered, as a delivery fee; (b) The amount of the tax on each certificate as and when this certificate is delivered. (This tax amounts to not less than frs. 2.50 per certificate and is to be deducted and held by them to protect their guarantee.)

You see from this that the B. F. A. will retain in its hands about 35 centimes per share, or frs. 3.50 per certificate of 10 shares each on all shares delivered. As shown by the statement enclosed in my previous letter the bills amount to frs. 183.897,66. At seven francs per share, the bills represent 26,271 shares. There are, however, the following expenses to be deducted from these 7 francs as and when the shares are delivered.

1. B. F. A.	FO	35
2. Tricart		25
3. Coleman		25
4. Kroll (perhaps)		12½ after
5. Other small commissions such as Ballin etc. probably another 25 c. 25		21.430 sh. are deld. free.

Making a total of—fr. 1.22-½ per sh.

A part of this, that is, the commission of Ballin and Kroll, not being paid until after the first 21,430 shares have been sold and delivered. This leaves approximately fr. 5.90 per share net with which to pay the expenses. The expenses therefore represent between 30,000 and 31,000 shares. Sum is to pay

Messrs. Tricart, Coleman, Kroll, Ballin, Iselin and such other expenses as may be necessary. This leaves frs. 5 to the credit of the company.

As a protection to the company, you can send such instructions to Mr. E. d'Anisy as you may think necessary, it being however, understood that the first monies to be paid shall be 25 centimes each to Messrs. Coleman & Tricart. The remaining amount to be paid will form the subject of another communication.

Very truly yours.

(Signed) P. B. LOCKER. [281]

Complainant's Exhibit No. 25 [Letter, Dated July 18, 1911, P. B. Locker to John Janney].

Paris, July 18, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City, Utah.

Dear Janney:—

After writing on the 11th and 13th, I don't know that there is anything that I can add to the statements contained in these letters. It is difficult to give any fuller explanations than are contained in them and I have written thus fully that the Directors may be well posted on the affair, and that they may realize that it is not for my personal interest that I have been working but I have been giving my best efforts to the company. It is now the 18th and I have had no report from you concerning the outcome of the legal proceedings on July 15th, date indicated in your letter for the decision to be reached.

I was called this morning by one of the underwriters who has taken shares and informed that he

had disposed of a part of his holdings and that he must have the certificates to deliver. He has sold these shares at the price at which they will be listed on the market and the underwriters have to guarantee not to let the shares return on the market before the issue is completed. You see that this demand necessitates my delivering the shares to the underwriters, and the question arises how am I to get the shares. I have made the case out to him, have read him part of the letter previously addressed to you for the delivery of shares to Mr. Tricart and to cover the conditions I am sending a demand to the company for the delivery of the shares.

If no other condition can be made, I will demand the delivery by the company of the shares to the order of Bernard Desouches and on payment of the seven francs per share, and will demand that the Banque F. A. return the money to me to the amount of frs. 150,000. The Bank, as you realize, will not assume any responsibility vis-a-vis the company for the delivery of shares to me and naturally will not deliver shares until you give them the necessary instructions.

I don't know whether you appreciate fully the position in which I am placed, but you should be able to realize this condition fully and I hope that the company has not the idea that it wishes me to give 2 years of my [282] time to this affair and then to cloak themselves in legal technicalities and leave the burden and responsibility upon my shoulders. I think I shall cable you $200 to-day so that you can feel free to cable me full information con-

cerning the situation.

I shall cable you not to act upon my letter of the 11th, but to await arrival of that of the 13th. I enclose herewith a demand for the delivery of the shares to the order of Bernard Desouches, so that there may be no excuse for the failure to deliver the shares. If you were here and knew the difficulties that I have to overcome and then work that I have done, you would realize how hard it is to have the additional worries that arise from such a condition as exists at that end.

I hope that you are not letting the damned prospectus rest in your mind and that you will feel that you have fully protected not only the interests of the company but the honeur of the gentlemen who are associated with Tenabo. If I Have five minutes with you it would be very easy to explain the whole affair, but it is no use trying to argue about what has been done; we should correct the faults and move ahead. A full knowledge of the entire facts in the case would make your mind perfectly easy.

As stated above I enclose herewith the letter to the Tenabo M. & S. Co. which you may use or not as you think best. There is one thing certain that we must get this affair floated and the floating of this will place me in a position to float the other propositions that we may have.

I think that I have the foundation for successful flotations here and the knowledge of conditions that I have acquired in my work will equip us for success. This is not the time to throw up our hands and quit, for we have to fight this game to the finish and

there is only one result to look for, and that is success.

As ever yours,

(Signed) P. B. LOCKER.

Complainant's Exhibit No. 26 [Letter, Dated "Juillet 25, 1911," P. B. Locker to John Janney].

Paris, le Juillet 25, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City, Utah.

Dear Janney:—

I am in receipt of your letter of the 11th and 12th and this morning have wired you as follows: [283]

"Have received your letter of the 11th—refer to our letter of 11th—refer to our letter of 13th—what action will they take?"

Your letter of the 11th is clear and I have carried out the ideas contained therein to the best of my ability as shown in my letters of 11th and 13th.

In arranging this matter I could not come to the conclusion of the Syndicate, that is the underwriting of all of the shares until I had some definite information from Salt Lake. From my letters written to the company, you will see that the money paid practically cover 30,000 shares of this stock and that it will not be very difficult for me to arrange to have, as soon as work begins in September, perhaps 20,000 or 30,000 more shares paid for and to be able to remit to the Company sufficient money to liquidate the obligations that you have and to continue the work.

The plan that I have carried out has not necessitated my making any representations as to the exact

amount that would go into the treasury. The parties interested in the contract receive a commission which fully protects me in the matter of receiving a commission myself, and I say to you frankly that my idea is to pay the expenses that have been incurred on behalf of Tenabo both by you and by myself, take for ourselves a reasonable profit, all of which we can itemize in a full and complete statement, and continue to lend our support to the company not only in our personal efforts but in our liberality from a financial standpoint.

The advertising, as shown in the contracts, will commence at the time that we elect, namely when the people begin to return from their holidays, between 1 and 15th September, but it is not advisable to spend money before Sep. 15 for publicity. Between Sep. 1 and December 1st, we will dispose of practically all the shares with the campaign that we have organized. This campaign will include not only all of the Journals but it will also include sending out circulars by various banks as was previously planned. We have had several men visiting the provincial bankers and it is estimated that we have about 100 of these at the present time, who will work on the affair when the publicity begins, for publicity in the journals relieves the small banker in country towns of the personal responsibility that he [284] would otherwise have and his ability to show what various journals are saying of the affair facilitates his placing shares. Advertising here is done differently from the American way. You never see display advertising here; it is all in the form of reading

notices and comments in the financial sheets.

I have been called up twice today and asked when I was going to deliver the shares that have been underwritten and paid for. I make all kinds of "stalls" but have held them off just about the limit. One day they will come in and demand their money or the shares and I will be in the devil of a fix insomuch as I shall be unable to deliver either one or the other.

In your instructions to the B. F. A. on the Bernard Desouches contract, you did not require that all 75,000 shares should be paid for at one time, and in fact the getting of a syndicate in its entirety was my own idea with the intention of protecting all those who had given me credit. Your plan has always been to deliver shares as and when called for on the payment of a certain sum of money, and because I have undertaken to form a syndicate on account of the backing that it gives, it does not entitle the company to say "Place the entire amount of money in the bank and then demand that we deliver the shares to you."

Your suggestion in the letter of July 12th, of the kind of letter to be written would be very easy to comply with if the conditions that you suggest in your letter had been those which actually exist, but my letters of the 11th and 13th will no doubt make it equally clear what is the actual state of affairs. I recognize how difficult it is for you to interpret in one season the letters that were written in another. You must realize that conditions change and I have already told you that I write of the conditions of the

day as they confront me. To illustrate, when it was decided that we would only send out circulars and not do the advertising, this decision was taken because we were not in a position to afford the advertising, had not the money to incur the expenses, and the market conditions were different from what they are today. Afterwards conditions changed. I I was able to raise the money necessary to make a contract along the lines that I deem the most advantageous, and had I been able to make this kind of contract in [285] October of last year, I would have had all the shares placed long ago. If I can combine the advantages of circulation, with the advantages of advertising in the provinces and call on the provincial bankers, I am simply more advanced than when I discussed the various conditions separately. Conditions are very different in France from what they are in America. It would be impossible to sell anything today because of the attitude of the public owing to the difference between Germany and France, but these affairs take on a different aspect from one week's end to another and if you hit at the proper moment with sufficient blare of trumpets, you are likely to dispose of the goods that you have for sale, and I presume that the company is willing to assist me in my efforts rather than to try how difficult they can make it for me to work.

Faithfully yours,

(Signed) P. B. LOCKER.

Complainant's Exhibit No. 27 [Letter, Dated August 8, 1911, P. B. Locker to John Janney].

Paris, August 8, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City, Utah.

Dear Janney:—

After writing you yesterday I received your letter of the 28th of July, acknowledging receipt of mine of the 13th. I also received a letter from Mr. Smith, which you no doubt read. I have also received today your cablegram as follows: "KINCOBXGEM, BREGMATIUM," which I take to mean "Waiting until examination Gem books and papers," and shall await anxiously the result of the investigation and the decision of the Board of Directors. I don't know that Mr. Smith's letter calls for a reply directly, but I will refer here to the second paragraph which is as follows: "the only qualification of this was that from the first moneys received from the sale of stock that you were to be reimbursed certain amounts . . . the intention of course being that your negotiation would be successful and would result in the sale of the stock and that you would be reimbursed from the first proceeds."

In reply to this I would say that no one knows when the first shares are sold that the sale of all the shares will be made, and the question where negotiations "would be successful" or unsuccessful can only be determined after the first moneys are received and

I cannot see the reasoning that would [286] deduce the conclusion that the expenses were "Unauthorized and without consideration." However, these points come under the heading of technicalities rather than of good faith and intention in financing the corporation in the interest of its stockholders. Every stockholder is interested in having the company financed and the intention, as I understand it, has always been that I should advance the money with which to conduct a campaign of effort to place the treasury stock and that from the sale, if there be a sale, I shall be reimbursed those expenses to the extent of the money that I have paid out legitimately on behalf of the corporation. This amount was however limited to francs 150,000 and any amount in excess of that would only be paid by the directors if they considered that they were made in good faith and in the interests of the company. At this time, as shown in the statements sent to you, the shares sold and the amounts received for them amount to frs. 96.250—You cannot deny that that money is due to me, nor can you deny that the money that will come from the sale of shares to the extent of frs. 150,000 is also due to me. The amounts in excess of that you can refuse to pay, but I believe that the Board of Directors will recognize the necessity of the additional expenditure and will give to it their approval.

In the second paragraph of Mr. Smith's letter he further states: "If you had consummated the negotiations and had sold the stock in compliance with your contract." . . . I have consummated the negotiations which have received the approval of the

Board of Directors, which recognition authorizes the payment of the frs. 150.000.

There is a misunderstanding of my intention as to the shares of stock to be delivered. The shares of stock that I wish delivered are only those which would be delivered to the individuals whose names I have sent to you and who have paid for their shares, and such other shares as will be delivered to the individuals who pay their cash, which cash goes to pay the additional expenses incurred and which at the present time have not been paid, but for which I have been given credit. Under these conditions, you will see that it is not my intention nor could I go into the market and take advantage of publicity, which publicity is paid for by me and for which I am obligated.

The representation to the purchaser that the shares are treasury stock is [287] equally true whether I gave to the company shares of stock in an equal amount as a guarantee and protection to them or whether I do not give those shares and the company pays the expenses. And my suggestion that I give to the company 21,000 shares as a protection to them was only to convince the Board of Directors that I had confidence in the results to be derived from the expenditure made by me, rather than an exchange of nominative shares for bearer shares.

As to the proper action in the matter of the Receivership I leave that to the judgment of the Board of Directors, who are more familiar with the conditions than I could possibly be, but it is equally true that shares of stock sold prior to the time of this

Receivership being secured were sold in good faith by me and purchased in the same spirit by those who bought the shares and if the company be unfortunate enough to have a Receiver appointed, it is not my fault, nor should the entire burden rest upon me, and until such Receiver be appointed, the company, I would claim, has no right to prevent the delivery of shares sold prior to the time of such notice to me, and there is no reasoning that I can see that would deduce the conclusion that I, having no control over the question of litigation that might arise in the company, and having expended my money and time in good faith, should be called upon to carry all of the burdens. Moreover the question of the prospectus does not enter into this as all of those who have purchased or contracted to purchase the shares of stock did so before the prospectus existed and only the reports furnished by the engineers of the company were offered as evidence in such sale.

My statements as to this affair are not a criticism of any act of the Board of Directors. I only make clear my views on the subject and assume that the Board of Directors have done the best they could under the circumstances and I appreciate to the fullest extent all the assistance and co-operation that they have given me. There is nothing new at this end except that I am almost afraid to enter my office for fear of finding someone standing at the door asking me to give back his money or to give him the shares, and if I don't hear from that end soon, I think I shall be forced to take a protracted vacation. So far I have only taken a week end in the country,

not feeling sufficiently in spirits to go further afield while [288] anxiously awaiting the decision from your end.

Faithfully yours,
(Signed) P. B. LOCKER.

Complainant's Exhibit No. 28 [Letter, Dated August 22, 1911, P. B. Locker to John Janney].

Paris, August 22, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City, Utah.

Dear Janney:—

I spent Saturday and Sunday in the country and returned yesterday. On my arrival I sent you the following cable. "Are there any further developments?"

A have been shunning the man who is after me for the certificates and unless I have something new in your reply cable, I shall have to go to the country again. I enclose you a copy of the letter written to me by Mr. Beardsley introducing Mr. Dumont. Mr. Dumont is a Frenchman who has lived in N. Y. for a great many years. He is making a flotation of a projected railroad from Memphis, Tenn. to Pensacola. I have been able to secure introductions for him and there are two parties considering his scheme.

The letter from Mr. Dumont to me, enclosed, gives you an idea of the attitude of Mr. Beardsley. Mr. Dumont, after going over the Tenabo affair very

thoroughly with me here was of the opinion that I would meet with success in my flotation.

Faithfully yours,

(Signed) P. B. LOCKER.

Complainant's Exhibit No. 29 [Letter, Dated October 23, 1911, P. B. Locker to John Janney].

Paris, October 23, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City, Utah.

Dear Janney:

After thinking the matter over, I have cabled you as follows: "In reply to your telegram of 22nd can send frs. 15.000 about Nov. 5th, full p*ra*ticulars will reach you by letter of October 23rd.

Faithfully yours,

(Signed) P. B. LOCKER.

Complainant's Exhibit No. 30 [Letter, Dated October 23, 1911, P. B. Locker to John Janney].

Paris, October 23, 1911.

Mr. John Janney,
105 Mercantile Block,
Salt Lake City, Utah. [289]

Dear Janney:

I beg to acknowledge receipt of your cable of Oct. 17th, as follows: "In the suit now pending—difficulty easily overcome if we can pay—liquidate all claims—can you offer subject to immediate reply by telegraph—$5000."

and that received this morning as follows:

"Have you received our telegram of 16th $3000—removes the objection."

I am studying the situation and trying to figure out what reply to make to you.

The situation here is thoroughly familiar to you from my previous letters. However, I may be able to raise the $3000 which frs. 8.000 is tied up by Mr. Picard our lawyer. The balance could be drawn out by the company, and if you will study the resolutions sent to the B. F. A. as to the drawing of money, and were to carry out the ideas included in that, sending to me a check, I would have it cashed and the B. F. A. would telegraph the money to you. I state it in this manner as all of the money is covered by a letter written by Picard, but frs. 8.000 are all that his amount represents, and I could have the remaining sum transmitted to you. Next: We have 6000 francs that will be paid to the office about Nov. 5th, another frs. 3.500 that will be paid in about the same time, making frs. 9.500, and with the balance in the B. F. A. frs. 4.043, this makes a total of frs. 13.543. This is not quite the $3000, but I would probable be able to raise the balance, making up a total of frs. 15.000.

If I am not able to raise the money and transmit it to you by telegraph before the time you receive this letter, I should be able to deposit in the B. F. A. an amount which, together with the frs. 4.043 held there, would make up the sum you require, i. e. frs. 15.000. As soon as I am able to deposit this money I will have the B. F. A. cable that they will accept a draft drawn on them by the company for the frs. 15.000.

My idea is that you should get from the Directors, about 20.000 shares of stock delivered to Mr. d'Anisy

of the syndicate against this payment of 15.000 francs and have shares delivered up to 40.000 against the payment to you of 20.000 francs more. However, I don't want to send to the B. F. S. any [290] documents that will be a record showing that you deliver shares against the payment of fr. 1. per share. Word your document to be merely an authorization to the bank to deliver to Mr. d'Anisy 20.000 shares, and when I telegraph to you five, ten or twenty thousand francs more, authorize them to deliver all the shares as requested. In other words, I don't want in the B. F. A. any record showing that shares are delivered at such a low figure. You can simply authorize them to deliver to Mr. d'Anisy so many shares against his payment to them of the tax called the "abonnement an timbre" on the shares delivered, provided I have telegraphed to you the money in advance or have had the B. F. A. telegraph you that they will accept your draft for given sums of money.

This covers the shares up to 40.000. After 40.000 you will authorize the B. F. A. to deliver to Mr. d'Anisy the shares against the payment of frs. 7.— per share and to credit my account with the difference between frs. 7 and frs. 5.—transmitting the frs. 5. to the Tenabo Mining & Smelting Co. Of these frs. 5. that part covering our profits will be distributed as we may hereafter agree upon.

I have recounted the above to show you that at the present time I have frs. 4.043 in the bank to the credit of the Tenabo M. & S. Co. In addition to this, I have the agreement of two parties to pay to me about Nov. 5th frs. 6.000 and frs. 3.500 respectively.

This makes a total of 13.543 francs and I should be able to raise another frs. 1.500 about, to make up the $3.000.

You see that I must do this outside the Syndicate because I cannot go to them when I have not delivered their shares and ask them to give me some money, as it would bring upon me a firm demand for the shares. The unsettled conditions of the Moroccan affair has made the syndicate easy to handle up to the present time, but conditions are improving now and I may look for a demand at any time to begin the publicity already paid for and guaranteed by various people. So I am figuring only on the money that I have in sight, without regard to whether or not the Moroccan affair will be settled before Nov. 5. Market conditions are improving, and if Tenabo is ever floated, it must be done when the public announcement is made of the close of the Moroccan affair. [291]

As soon as I can get this money, I will deposit it in the B. F. A. and have them cable you that they will accept the draft of the company for that sum. It would be easy enough for you to have the draft cashed in Salt Lake City against the representations of B. F. A. or better still, I suppose, it would be to have the B. F. A. cable Walker Brothers in Salt Lake to the effect that they will honor the draft of the company for the sum mentioned.

Faithfully yours,

(Signed) P. B. LOCKER.

Complainant's Exhibit No. 31 [Letter, Dated November 19, 1910, to P. B. Locker].

Nov. 19, 1910.

Mr. P. B. Locker,
Hotel Chatam,
Paris, France.

Dear Payton:

Mr. Howard, who has been sick, was out today and I have signed up the letter to the Franco-Americane Bank by the President and treasurer, embodying the order to pay the 150.000 francs to the underwriting syndicate, and am getting this letter together with certified copy of resolution in the fast mail today.

At the last meeting of directors we spent from 10 o'clock until 1 on the matter of paying Coleman, Iselin, Kroll and Ballin their commissions and have passed resolutions covering this, certified copy of which will be sent you, perhaps in this same cover. The purpose of drawing this in two resolutions as you will have it follows from the following line of reasoning:

If any one knows of your commission they are liable to tell others, and if any interested in the deal know it, they are liable to ask you the amount of your commission. They would perhaps consider they had a right to know and perhaps they would. You would probably tell them it was none of their business. Resulting friction might break up the deal, and it is a very simple matter to pass two resolutions rather than take any chances of having this deal broken up.

If the question of your commission ever arises, you would have to tell them it was none of their business, or else specify as we did in New York, that from the result of treasury stock sales certain funds would be set aside for development and certain specified equipment expenditures would be made leaving a margin to cover your commissions. As there is a certain percentage [292] of chances that either one of these answers would be unsatisfactory, the only logical conclusion is to avoid the question being raised as far as possible.

We therefore send the second resolution, of the two which we send you, to the bank, from which you will gain the idea operating in our mind. Mr. Smith, who first raised this question, also raised the point that others interested in the deal, knowing of your commission, would try to hold you up to the limit, which also is, I believe, probable. You can see how closely the Directors are looking into all matters which they pass upon and how carefully they proceed.

There is very little to write of from this end of the line. I have written to Hartford relative the assessment work on the wax property and will write you a separate letter on this subject. I have about got signed up all the various papers covering the Colton Oil proposition and when I get this completed will write you fully as to it.

Have ordered Raleigh to go ahead with the assessment work in Tenabo, but have made no arrangements as to the payment of the bills. Am slowly carrying on correspondence with Raleigh relative

options, trying to keep things tentatively held open until I can hear what the plan is that you have in mind that you wrote about two or three months ago and as to which you have written me nothing further. Raleigh wants $35,000 for the claims Weston secured an option on, on the same terms as Weston had, which looks to me like too much money.

of securing on the which I am sure will please you. There is a large size photograph of the Utah Copper workings showing a number of steam shovels at work, cutting down the hill, and which together makes quite an impressive photograph. A cut could be made from this and published with your advertising under which could appear some comparative statement, for instance, a quotation from Weston's letter where he compared the Copper Hill property with the Utah Copper, and in connection with the comparison of the Copper Hill possibilities with the Utah Copper this photograph might be of great interest. I went to the photograph gallery to send you one but found that they cost $7 which these days is a very material consideration. [293]

It would be hard for you to imagine the financial straits one can run into by a continuation of the policy of paying out with nothing coming in and no possibility of getting anything in as long as I stay in this country. If, however, you consider this important you could get the underwriting syndicate to send me an order for this and maybe other things that you might think of that would be a help to them in advertising.

I hope you received the plates of the Tenabo photographs all right, which I sent you some time ago, also the maps, etc. If there is anything else along this line, do not hesitate to call for anything we can send you because I consider this part of the business of utmost importance. The stock cannot be sold without educating the mind of the French public investors to its value and this must be by the proper presentation of all the strong facts which can be brought to bear upon the question. Along this line the statement made by Gen. Warren comparing the showing at Tenabo with that of Goldfield at an equal period of development, in conjunction with one of the quarterly statements of the Goldfield consolidated (provided Mr. Warren's statement was sincere and not hot air) might be of some advantage. I am not familiar enough with the conditions at Goldfield in its former stage of development to know, but am inclined to doubt the plausibility of Gen. Warren's remarks.

How are you getting along with the Pioche Mines proposition? Conditions in Pioche are creating a great deal of comment here in Salt Lake, and each day it looks more and more like there is some foundation to the rumor that the Standard Oil interests are buying up the low grade fluxing ore properties there as a foundation for a smelting plant.

I hope you will continue to keep us posted as to the developments both in the Pioche and in Tenabo after the public begins to be tested on the success of the flotation. You have certainly been very good about writing, and I hope you will keep it up, also

that your health continues good and that you have had no further recurrence of your appendicitis.

Please give my kindest regards to Mr. Kroll and Mr. Ballin and wishing you all kinds of good things, believe me,

As ever yours. [294]

Complainant's Exhibit No. 32 [Letter, Dated April 12, 1912, P. B. Locker to John Janney].

Paris, April 12, 1912.

Mr. John Janney,
Leesburg, Va.

My dear Janney:

I enclose herewith a copy of a letter addressed to me by Mr. Mont Ferry and copies of my replies thereto. I thought it better not to give fuller details as you had no doubt communicated to them the contents of my letters and you may write to them, making such comments and adding such details as you wish to put before them.

I wish you would also write me and suggest the covering of any other points that you may deem advisable.

Faithfully yours
(Signed) P. B. LOCKER.

Copy.

Salt Lake City, March 25, 1912.

Mr. P. B. Locker,
9 due Pillet Will, Paris.

My dear Mr. Locker:

The directors of the Tenabo company, have, as you know, been subjected to an examination before a commissioner in matters pertaining to a law suit against our company, which is now pending in

Nevada. It became apparent during the examination that considerable stress was laid upon the company's failure to communicate directly with you and likewise your failure to communicate directly with the company, reporting what progress had been made in your negotiations and what the status of those negotiations was from time to time. It now seems desirous to us that you submit a statement which shall cover briefly the following points:

1. The numerous and complicated preliminaries necessary.
2. The tremendous expense incurred by you.
3. An outline of the plan for the sale of our securities.
4. The present status of the campaign.

You will understand how this matter should be covered, for we desire to use it and perhaps introduce it in our defense during April. Letters touching upon this matter which you have written to Mr. Janney have of course been submitted to us and are of course of reports from time to time covering your operations. However, we deem it desirable that you communicate directly with me as president covering the matters outlined above. I do not apprehend that the contention made by our opponents in this law suit will [**295**] prevail, but I desire to use every precaution to protect the company and its stockholders. With kind personal regards, I am,

Very truly yours,

(Signed) W. MONT. FERRY,

President, Tenabo Mining & Smelting Co.

Complainant's Exhibit No. 33 [Letter, Dated April 11, 1912, P. B. Locker to W. Mont. Ferry].

Paris, April 11, 1912.

Mr. W. Mont. Ferry,
President of the Tenabo Mining & Smelting Co.,
Utah Savings & Trust Co.,
Salt Lake City, Utah.

My dear Sir:—

For the sake of order, I wish to give you a brief outline of the efforts put forth, and the work done, on behalf of your company in order to place its shares in France.

After a campaign in the East to sell the treasury shares of the Tenabo Mining & Smelting Company, a campaign which was unsuccessful owing to the interference of stockholders who wished to profit personally at the expense of the other stockholders I decided to seek, in France, a new field and, if possible, to get away from the influence that prevented success in New York.

To this end I came to Paris, investigated conditions, returned to New York, secured the services of one of the prominent firms of French lawyers there, (Coudert Freres), to outline the plan of procedure necessary to secure the admission to sale in France of the shares of the Tenabo Mining & Smelting Company. This plan I presented to your company and undertook the work. The admission of foreign securities in France is very difficult.

1. A very heavy tax, or admission fee, is imposed on all foreign securities.

2. This tax must be paid for three years in ad-

vance, or the foreign company wishing to place its shares must secure a responsible representative (Agent Responsable), acceptable to the French Government, who guarantees the payment of this tax.

3. The foreign company must have its articles of incorporation, by-laws, etc., published in a Journal (Official) together with the application for admission of these securities, made by a responsible French citizen.

4. After an investigation by the Government of the citizen making the [296] application for admission, and the "Agent Responsable," the foreign company is either admitted or not admitted to sell its shares in France. If admitted, it must then comply with the conditions imposed by the Stock Exchange (Bourse).

(a) That none but bearer certificates (Certificates au Porteur) are admitted to quotation. (b) That a foreign company must issue its shares in this form through a trustee. (c) That the Trust Agreement by which the certificate au Porteur are issued, must be acceptable in terms and conditions both to the Bourse and to the Government. (d) That one of the parties to the Trust Agreement must be responsible French Financial Institution.

5. Under the present laws of France, no one has the right to negotiate, sell, or contract to sell any foreign security until all the above conditions have been complied with, under penalty of a heavy fine or imprisonment, or both.

All of these formalities have been complied with for your company entailing an endless amount of

work and the expenditure of a large sum of money. For example, to comply with paragraphs 1 & a, I secured the Banque Franco-Americane as your "Agent Responsable," whose direct responsibility, for taxes alone, is frs. 45.000 — $9.000. To comply with paragraph 4, (b & C) I secured the Windsor Trust Co., of New York, as trustee and in France, the Banque Franco-Americane, as signatary of the Trust Agreement and "Services Financiers." The fee of the Windsor Trust Co., was 3.000 and that of the Banque Franco-Americane 1.800. The legal fees of Coudert Freres, Rollins & Rollins, on account of the Windsor Trust Co.; A. L. Picard, in Paris, on account of your company, and De. Molens for the syndicate de la Bourse, amounted to $3.800 — $17.600.

To provide the certificates au Porteur, to comply with paragraph 4. 2., it was necessary to have the text of the certificates both in French and English and printed from steel engravings, each certificate with two signatures, as well as an equal number of nominative certificates with two signatures, the cost of the 45.000 "Certificate au porteur," and the 45.000 nominative certificates, and the signatures and delivery in Paris by the Windsor [297] Trust Co. of the same amounted to $10.148.27

to comply with paragraph 3 it required an expenditure of..... 491.

Total $28.239.27

The expenses incurred by me on behalf of your company amounted in reality to over $30,000, before

I was in a position to negotiate legally your shares and in this sum there is no allowance made for personal expenses nor for my time.

During the months required to complete the various formalities, I had observed that, in general, any issue, made in France, of securities that proved a success, was advertising in the political and financial press both of Paris and of the Provinces. By investigating, I determined that the financial columns of all the French newspapers, of any value, were leased to two or three syndicates or agencies; that all of these agencies were controlled by the same group of people; that an advertising contract with one of these agencies was the only way to secure publicity and that such a contract for publicity was necessary before attempting to make an issue.

The necessity of such advertising contract will be apparent to you when you consider that a bank, of the strength and standing of the Credit Lyonnais, pays from three to five hundred thousand francs for publicity with each and every issue of bonds made by it, even though it knows in advance that the issue will be many times over-subscribed.

At that time the political outlook in Europe was not very clear and no banker would assume the responsibility of advancing the money necessary to make the publicity and no banker would undertake the issue without such publicity. I then decided to form an underwriting syndicate and by that means provide the funds for publicity and secure the sale of a certain number of shares, thereby providing the company with funds. This syndicate I formed for

75,000 shares, and gave to it an option on the remainder of the 45,000 certificates. A committee of three was elected to direct this syndicate, consisting of Mr. Coleman, director of the Banque Franco-Americane; Mr. G. Hirschmann, of the Bank Hirschmann & Cie; and Mr. Bernard Desouches. These gentlemen, all of whom had taken a certain number of shares, wished [298] to make the issue at an opportune moment, and at a time when they would have a reasonable chance of success. They interested certain bankers in the proposition and had decided, after various delays, to commence the placing of the shares in the spring of 1911, although the market was anything but encouraging. However, at this time the litigation in which your company was involved, and the order to the Banque Franco-Americane not to deliver shares, together with derogatory letter written by certain of your stockholders to certain underwriters and bankers here, formed a legal basis for many of the underwriters to refuse to keep their engagements and to demand the return to them of the money they had already paid. After considering this question, it was decided that it was to the interest of all concerned to repay those who demanded it and to form a new syndicate composed of those syndicataires who wished to remain in and such others as we might be able to secure.

This new syndicate was formed for the purchase of 40,000 shares, and Mr. P. Tricart was elected as director of its operations. The reports of your engineers, Messrs. MacVichie, Brown, Schultz, Gillette, L. Humphreys and Weston, were submitted and

formed the basis of the subscription, all of the syndicataires declaring that they knew the contents thereof and made their subscriptions based on the said knowledge.

The syndicate, through its director, Mr. P. Tricart, made a contract for publicity with one of the agencies and paid to this agency frs. 100,000, as a minimum guarantee. To secure the full and hearty co-operation of the Press, it was deemed advantageous to give a commission of a certain number of francs per certificate sold, which sum is to be divided among the varous journals.

Mr. Tricart also secured the co-operation of five banks whose agents and branches in the provinces were to take up the placing of your shares.

All was then in order to begin the placing but the market conditions were very bad owing to the disturbed political situation in Morocco, and the strained relations of France, Germany and Spain on this subject. Then came the war between Italy and Turkey, and it was the opinion of the syndicate that the moment was not opportune for the introduction of the shares. [**299**] However, knowing the needs of your company, I insisted upon the introduction being made, and the shares of the Tenabo Mining & Smelting Company were introduced upon the French Bourse in December last, and since that time I have been able to send to you a small amount of money.

Within the last few weeks, Mr. Tricart has been able to add another influential bank to the list of those working to place the shares of your company, and these bankers, among themselves, have recently

provided a fund of frs. 85,000 to extend still further their operations by sending out circulars and letters to their clients, and the public in general, and with the present rise in the price of copper it is believed that they will, with reasonable success, place a large block of your shares.

The present outlook in copper is encouraging and the expenditure of the frs. 85,000 on the part of the bankers indicates their confidence in the eventual success of the issue and their campaign is to begin this week.

I have therefore caused to be expended
on account of your company, not only the
above mentioned $28.239.27
100.000 francs for publicity..... 20.000
and the frs. 85.000 provided for the fur-
ther extension of campaign 17.000

making total of.....$65.239.27
but I have been obliged to furnish and maintain an office, to employ a secretary understanding thoroughly both French and English, and to retain the services of a lawyer to watch over the interests of your company.

These expenditures have *amount* to frs. 24,720 (about $4.944) to date, without any consideration being given to my personal expenses and time.

In conclusion, I wish to state that at the present time there are six bankers occupying themselves with placing the shares of the Tenabo Mining & Smelting Company; that they have a fund of frs. 85.000 to carry their proposed campaign into effect; that the

political horizon seems to be clearing, a condition which invariable procedes the making of investments by the French public, and those in a position to know give it as their opinion that the market outlook is improving, and will continue to improve and the moment is rapidly approaching when new issues will have a good chance of success, and [300] copper stocks in particular.

Faithfully yours,
(Signed) P. B. LOCKER.

Complainant's Exhibit No. 34 [Letter, Dated December 6, 1910, Andrea L. Picard to John Janney].

December 6th, 1910.

John Janney, Esq.,
105 Mercantile Block,
Salt Lake City, U. S. A.

Dear Sir:—

I beg to hand you enclosed copy of a letter to me from Mr. J. H. Coleman, one of the managers of the Bank Franco-Americane dated the 29th of November; also the underwriters list therein mentioned.

I propose writing a full report as to the present situation of affairs explaining you in detail the work done and the present outlook; this report I hope to send to you by next mail. Meanwhile I beg to remain, dear Sir,

Yours very truly,
(Signed) ANDRE L. PICARD.

2 Encl.

Paris, November 29, 1910.

Monsieur A. L. Picard,
Avocat–Conseil,
17 bis rue de la Boetie, Paris.

My dear Sir:—

At the request of Mr. Locker, I am sending you a list of the underwriters who have subscribed for 75.000 shares of the Tenabo Mining & Smelting Co., and the amounts of their subscriptions.

As you are aware, we have used all the facilities of this bank in determining the responsibility of the applicants before underwritings were accepted and it is my opinion, based upon reports received, that they may all be considered financially responsible for their undertaking.

Very truly yours,
(Signed) J. COLEMAN.

Paris, December 9th, 1910.

Tenabo Mining & Smelting Co.

John Janney, Esq.,
105 Mercantile Block,
Salt Lake City.

Dear Sir:—

Following on my letter to you of the 6th inst., sending you a copy of the letter from Mr. J. H. Coleman and a list of the underwriters [301] thereto annexed, as attorney of the Tenabo Mining & Smelting Company, I now beg to sum up the situation for your information and guidance:

1. General outline of the plan followed:

The first negotiations which Mr. Locker has in France with various bankers such as the "Banque de

l'Union Nouvelle" in Paris and a similar firm in Brussels and others proved that most of the people approached were unwilling to purchase *firm* a block of shares while they were desirous to receive a sum of money cash for expenses in "publicity" and "otherwise."

On the other hand it was unwise to give an option which would have extended over a long period of time without any possible guarantee as to the success of the party to whom the option would have been given.

It was therefore thought preferable to devise a third plan giving a short option which would be extended on the condition that a syndicate of underwriters acceptable to your company would be formed in a given time, the expenses altogether reckoned at 150.000 francs to be advanced by the person holding the option or his assignees and to be borne by your company only out of the proceeds of the first sales to be made in France; this is the contents in a few words of the contract between your company and Mr. Bernard Desouches which contract is dated the 1st of August 1910.

2. Legal steps which had to be taken.

You are already aware that under the French law shares of a foreign company can be sold or offered to a banker, or negotiated, or introduced on the Paris Bourse before the following formalities have been complied with:

(a) A publication must be made in the so called annexed bulletin to the French Official Journal and such publication must include a notice giving a cer-

tain quantity of information to the French public concerning the capital of the company, its balance sheet, its registered office, the meetings of the shareholders, the number of the shares issued as Vendors' shares, etc., etc.,—such publication must also include a French translation of the Articles of Incorporation and a French translation of the by-laws of the company, the necessary publication under the law was made in the annexed bulletin to the official journal of the 17th of October 1910.

(b) It is also necessary and compulsory to obtain from the French Fiscal [302] Authorities a so-called "Abonnement" or agreement of the Government that the taxes owing by the foreign company in France be paid every three months under the guarantee of a surety or as the French law calls him of an "Agent Responsable"; to this effect I have had to file with the Fiscal Authorities a certified copy of the by-laws and a translation into French of the same, the official engagement signed by the company under which the company binds itself to pay the taxes due in France, an opinion on the laws of the State of Nevada certified to the United States Consulate in Paris to the effect that the above documents were regular and binding on the company; I had also to file such documents as would cause the Government to accept the "Banque Franco-Americane" as surety or agent responsible as above explained.

We have complied with these different formalities and after some negotiations with the Fiscal Authorities our papers have been accepted and the Banque Franco-Americane has been authorized to act as

Agent Responsable the decision of the French authorities on the subject being dated the 1st of November 1910.

At this moment an incident arose to which I shall briefly call your attention; a letter from the Fiscal Authorities was received by the Banque Franco-Americane asking for exact information as to all contracts made in connection with the proposed issue, the object of the Fiscal Department being to endeavor to find out whether contracts had not been made before the 1st of November (the date when the security had been accepted as above explained) as if we had not so informed the authorities the company might have been involved in penalties and fines. To avoid this the answer we caused to be given to the Fiscal Authorities was to the effect that the issue was being made under an option dated the second of November and Mr. Desouches's contract with the company dated the 1st of August was therefore replaced by another contract in the same wording and dated the 2nd of November 1910, the changes between the two agreements being only formal leaving out such dates which had already elapsed, but giving a prolongation of six weeks in the different dates mentioned in the original agreement. The contract of the 2nd of November is, I believe, before you. **[303]**

3rd. Application for an official quotation.

It was thought important in connection with the sale of your shares in France to obtain not only a private quotation (it is only a matter of ordinary publicity) but also a quotation in the official list published by the syndicate of bankers at the Paris

Bourse; this syndicate is extremely technical and is generally thought that it is exceedingly difficult to obtain such a quotation; as we had decided to make an attempt I thought it best instead of merely sending our papers to the syndicate to have them passed beforehand by the gentlemen who is the attorney and legal adviser of the syndicate; I therefore submitted to him some time ago our papers, i. e., copy of those which had been sent to the Fiscal authorities as previously stated and in addition the certificate for the shares, the stock trust agreement already signed and the translation of this document into French.

We have had four long sessions with the attorney for the bankers' syndicate and I have succeeded in disposing of the many petty objections he had raised against the form of our certificates. Further I satisfied him as to a number of questions which he brought forward, the only question still at issue being the stock trust agreement which will have to be more or less altered to meet the requirements of the syndicate; I am at present engaged on this work.

4. Further contracts.

The negotiations which Mr. Locker has followed in France on behalf of the company have made it necessary from time to time to enter into various agreements as to commissions and I understand that you have before you copies of such agreements; I need not therefore refer to them more in detail.

5. Present position.

Referring to the first paragraph of the present letter and to the list of underwriters which was sent to you by my office on the 6th inst. I shall now add

that in conformity with the clauses of the form signed by the underwriters a meeting was summoned and held on the 23rd of November last for the purposes to elect two additional members of the managing committee of such syndicate of underwriters; Mr. Coleman had been acting as **[304]** sole manager until that time and his services were valuable to all concerned; you are aware that Mr. Coleman is one of the two managers of the Banque Franco Americane, that this bank has a large French and American clientele and that they have issued or have been or are interested in several issues such as "The Minas Pedrazzini Gold and Silver Mining Co." "The Magic City Co.," etc., their capital has been raised from $2,000,000 to $4,000,000.

The two members who were elected as co-managers with Mr. Coleman are Mr. Desouches and you are already acquainted with this gentleman as being the holder of the option. The second underwriter who was elected as manager is Mr. George Hirschmann a banker in Paris who has I am informed, a good connection in the province amongst local bankers and whom I have known personally for some time.

These gentlemen will direct the placing of the shares in France and from the proceeds of such sales seven francs per share will be put to the credit of your company deducting commissions as under instructions to the bank; no commission however will under the contracts I have drawn be paid on the proceeds of the first shares up to 150,000 francs, this sum when received will be paid over to the managing

committee to cover expenses.

I shall be glad to clear up any point as to which you may require an explanation and meanwhile remain, dear sir,

Yours very truly,
(Signed) For ANDRE L. PICARD,
E. A. B.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Chas. D. Bates vs. Tenabo M. & S. Co. Statement on Appeal. Filed April 3d, 1914. T. J. Edwards, Clerk. **[305]**

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,

Defendant.

Stipulation [Including Statement of Evidence on Appeal, etc.].

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the "objections and proposed amendments to appellant's condensed statement of the evidence" heretofore filed herein by the appellee may be allowed and incorporated into and with the "statement of evidence for use on appeal" heretofore lodged in the clerk's office of said court for examination, and that the said

statement of evidence with said objections and proposed amendments incorporated therewith may be approved and allowed as the statement of the evidence to be included in the record on appeal in said cause.

And it is hereby further stipulated and agreed that the record on appeal in said cause may be made up by the clerk in accordance with the rules of practice affecting the same and be transmitted to the clerk of the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, and said record there filed and the case docketed pursuant to rule 16 of said Circuit Court of Appeals.

Dated, May 20, 1914.

J. D. SKEEN,

One of the Solicitors for Plaintiff and Appellee.

H. C. EDWARDS,

Solicitor for Defendant and Appellant.

Pursuant to the foregoing stipulation it is hereby ordered that the statement of the evidence for use on appeal heretofore lodged by defendant and appellant together with and including the objections and proposed amendments to appellant's said condensed statement of the evidence heretofore lodged herein by the plaintiff and the objections and amendments by appellee be and the same is hereby allowed and approved as the statement of the evidence for use on appeal in said cause.

Dated, May 22d, 1914.

E. S. FARRINGTON,

Judge.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Chas. D. Bates vs. Tenabo M. & S. Co. Stipulation approving statement of evidence on appeal. Filed May 22d, 1914. T. J. Edwards, Clerk. **[306]**

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY.

Defendant.

Restraining Order.

This cause coming on for hearing before the Court, the complainant appearing by his solicitors, J. D. Skeen and Corwin S. Shank, the defendant appearing by its solicitors, Edwards & Ashton, and after the introduction of evidence on behalf of both parties hereto, and the argument of counsel, and the Court being fully advised in the premises, and it appearing that it is expedient to give time within which to file briefs herein, and that pending the final decision of the court the property and all conditions of the company should remain *in statu quo*, and upon application of the solicitors for complainant for a restraining order, to that effect it is now and here ordered and adjudged that the defendant, its officers, agents and attorneys be, and they are hereby, restrained and enjoined from disposing of or in any manner encumbering any of the property

and assets of this corporation, including the treasury stock thereof, and are further enjoined and restrained from paying out any moneys whatsoever, including the $1283.61 now in the Walker Bros. Bank of Salt Lake City, Utah, and the $47.92 now in the Merchants' Bank of Salt Lake City, Utah, and they are further enjoined and restrained from contracting any obligations or indebtedness for or on behalf of the defendant company for any purpose whatsoever, excepting as authorized by the court. All until the further order of the court.

Done in open court this 11th day of September, A. D. 1912.

E. S. FARRINGTON,
United States District Judge.

[Endorsed]: No. 1183. In the District Court of the United States, in and for the District of Nevada. Charles D. Bates, Complainant, vs. Tenabo Mining and Smelting Company, Defendant. Restraining Order. Filed September 11th, 1912. T. J. Edwards, Clerk. **[307]**

In the District Court of the United States, Ninth Circuit, District of Nevada.

No. 1183.

C. D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY,

Defendant.

Order Modifying Restraining Order.

Upon reading and filing the verified petition of Tenabo Mining & Smelting Company, the above-named defendant, by H. C. Edwards, its solicitor, and it appearing therefrom that in order to preserve and protect the mining claims and property hereinafter mentioned, it is necessary that the annual assessment work, under the laws of the United States, upon said mining claims and properties, for the year 1913, be performed;

Now, therefore, it is ordered and adjudged that the defendant, Tenabo Mining & Smelting Company a corporation, be permitted and authorized to do the necessary annual assessment work for the year 1913, on or for, and on behalf of, the following lode mining claims, situated in the county of Lander, State of Nevada, known and described as follows, to wit:

The Ollie, Reno, Winnemucca, Widow's Extension, Copper Hill No. 1, Copper Hill No. 2, Copper Hill No. 3, Copper Hill No. 4, Reliance No. 1, Reliance No. 2, Reliance No. 3, Reliance No. 4.

It is further ordered, adjudged and decreed, that the restraining order heretofore issued out of said court on the 11th day of September, 1912, be modified and the same is hereby modified so as to permit the said defendant, its officers, agents, servants and attorneys, to perform said assessment work and to contract such obligation or indebtedness, or to encumber its property or assets, as is necessary to raise sufficient revenues for the purpose of performing such assessment work.

It is further ordered, adjudged and decreed that the authority herein granted is restricted solely to the performance of said assessment work and to the raising of sufficient funds whereby said work may be performed and that no ores or minerals extracted from said mining properties or either of them shall be taken from or off of said properties or either of them, **[308]** or in any wise converted by the said defendant or its officers, agents, employees, servants or attorneys.

Dated this 17th day of December, 1913.

E. S. FARRINGTON,
District Judge.

[Endorsed]: No. 1183. In the District Court of the United States for the District of Nevada. C. D. Bates, Complainant, vs. Tenabo Mining & Smelting Company, Defendant. Order Modifying Restraining Order. Filed this 17th day of December, 1913. T. J. Edwards, Clerk. Samuel Platt, Carson City, Nevada, Attorney for Defendant.

[Petition for and Order Allowing Appeal and Fixing Amount of Bond.]

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,
Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,
Defendant.

To the Honorable E. S. Farrington, District Judge:

The above-named defendant feeling itself aggrieved by the interlocutory decree made and entered in this cause on the 14 day of February, A. D. 1914, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, State of California, and your petitioner further prays that the proper order touching the security to be required by it to perfect this appeal be made.

H. C. EDWARDS,
Solicitor for Tenabo Mining and Smelting Co., Defendant.

The foregoing petition on appeal is granted and the claim of appeal therein named is allowed, and the amount of cost bond on appeal fixed at the sum of five hundred dollars.

Dated, March 13, 1914.

E. S. FARRINGTON,
District Judge. **[309]**

[Endorsed]: No. 1183. In the District Court of the United States in and for the District of Nevada. Charles D. Bates, Complainant, vs. Tenabo Mining & Smelting Company, a Corporation, Defendant. Petition for Appeal. J. D. Skeen, Corwin S. Shank,

Attys. for Complainant. H. C. Edwards, Atty. for Defendant. Filed March 14th, 1914. T. J. Edwards, Clerk.

[Bond on Appeal.]

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,

Defendant.

Know all men by these presents that we, Tenabo Mining & Smelting Company, a Nevada corporation, as principal, and P. M. Lee and N. Coffin, as sureties, acknowledge themselves indebted to Charles D. Bates appellee in the above cause in the sum of Five Hundred Dollars, conditioned that

Whereas on the 14th day of February, A. D. 1914, in the District Court of the United States in and for the District of Nevada, in a suit pending in that court wherein Charles D. Bates was complainant and Tenabo Mining & Smelting Company, a corporation, was defendant, numbered in the Equity Docket as No. 1183, an interlocutory decree was rendered against said Tenabo Mining & Smelting Company, and the said Tenabo Mining & Smelting Company, has obtained an appeal to the Circuit Court of Appeals of the United States in and for the Ninth Circuit, and filed a copy thereof in the office of the

clerk of the court to reverse said decree, and a citation directed to the said Charles D. Bates citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, in the State of California on the 12th day of April, A. D. 1914, next.

Now, if the said Tenabo Mining & Smelting Company shall prosecute its appeal to effect and answer all costs if it shall fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

In Witness Whereof the said Tenabo Mining & Smelting Company has caused **[310]** these presents to be executed on its behalf by its president and the said F. M. Lee and N. Coffin have hereunto subscribed their names this 13th day of March, A. D. 1914.

TENABO MINING AND SMELTING COMPANY,

By W. MONT. FERRY,
Its President.

F. M. LEE.
N. COFFIN.

State of Nevada,
County of Washoe,—ss.

F. M. Lee and N. Coffin, being first each severally duly sworn, on oath severally say that he is a resident of the State of Nevada and County of Washoe, and that after paying all of his just debts and liabilities he is worth more than $1000.00, in real estate located within the jurisdiction of the District Court of the

United States in and for the District of Nevada, subject to execution, levy and sale.

F. M. LEE.
N. COFFIN.

Subscribed and sworn to before me this 13th day of March, A. D. 1914.

[Seal] J. W. DAVEY,
Notary Public.

My commission expires April 24, 1915.

The sufficiency of sureties on the foregoing bond approved this 13th day of March A. D. 1914.

E. S. FARRINGTON,
Judge.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Chas. D. Bates vs. Tenabo Mining & Smelting Company, a Corporation. Bond on Appeal. Filed March 14th, 1914. T. J. Edwards, Clerk. **[311]**

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,
Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,
Defendant.

Assignment of Errors.

And now, on this —— day of March, A. D. 1914, came the defendant by its solicitor, H. C. Edwards,

and says that the interlocutory decree entered in the above-entitled cause on the 14 day of February A. D. 1914, is erroneous and against the rights of said defendant for the following reasons:

1. Because it appears from the record in this cause that the bill of complaint was brought by Charles D. Bates, complainant, as a stockholder of the Tenabo Mining & Smelting Company, the defendant corporation, for the purpose among other things of winding up the affairs of the Tenabo Mining & Smelting Company and in connection therewith the appointment of a receiver to take possession of all of the assets of said corporation located within the State of Nevada and to sell the same and after deducting the costs and expenses of said proceeding, including counsel fees, that the assets be distributed among the creditors and the surplus, if any, distributed *pro rata* among the stockholders of said corporation, and that all of the stockholders of said corporation were not made parties to said suit and that each and every stockholder of said corporation is a necessary and proper party to said suit.

2. Because it appears from the record in this cause that the bill of complaint in this cause was brought by Charles D. Bates complainant as a stockholder of the Tenabo Mining & Smelting Company, the defendant corporation, for the purpose among other things of winding up the affairs of the Tenabo Mining & Smelting Company, and in connection therewith the appointment of a receiver to take possession of all of the assets of said corporation located within the State of Nevada, and to sell the same and after

paying the costs and expenses of said proceeding, including counsel fees, that the assets be distributed among the creditors and the surplus, if any, distributed *pro rata* among the stockholders of said corporation, and that said **[312]** complainant among other things based his right to such remedy on the ground that the directors of said defendant corporation had been guilty of fraud and illegal acts injuriously affecting the rights of said complainant and said complainant did not make any of the directors of said corporation parties to said suit and all of the directors of said corporation are proper and necessary parties.

3. Because it appears from the record in this cause that the defendant corporation was not at the time said interlocutory order or decree was made and entered insolvent.

4. Because it appears from the record in this cause that complainant was not entitled to have an interlocutory order or decree entered therein appointing a receiver and the application therefor should have been denied.

5. Because it appears from the record in this cause that the interlocutory decree made and entered by the Court in this cause on the 14 day of February, 1914, appointing said receiver *in* the only decree which has been entered in said cause and that by said interlocutory decree said receiver is ordered to forthwith take possession of all of the real and personal property of said corporation and to sell the same for cash at public sale and to keep a complete and accurate record of all of his doings. including

an inventory of all property received and held or sold, all moneys expended and debts incurred, and at the earliest practicable date report fully to said Court the exact status and condition of the affairs of said corporation and of his administration thereof, and that no decree has been made or entered by said Court adjudicating the right of said complainant to have the defendant corporation dissolved or its affairs wound up.

6. Because as appears from the record in this cause said action was tried upon its merits and submitted to the Court for final adjudication and the evidence showed that said corporation was not insolvent and that complainant was not entitled to have a decree made or entered dissolving said corporation or winding up its affairs.

7. Because it appears from the record in this cause that the complainant was not entitled to have the property of said defendant corporation sold under a receivership unless said corporation was dissolved or its affairs **[313]** were wound up and the evidence in said cause showed that said complainant was not entitled to have a final or any decree entered dissolving said corporation or winding up its affairs.

8. Because the evidence in said cause showed that said complainant was not entitled to have a decree of said Court made or entered granting the prayer of his bill or any part thereof.

Wherefore said defendant prays that the said interlocutory order or decree be reversed and that the District Court of the United States in and for the District of Nevada may be directed to enter a

decree vacating its order and interlocutory decree appointing said receiver and that this court enter or cause to be entered a decree on the merits of the whole cause.

H. C. EDWARDS,
Solicitor for Defendant.

[Indorsed]: No. 1183. In the District Court of the United States in and for the District of Nevada. Charles D. Bates, Complainant vs. Tenabo Mining & Smelting Company, a Corporation, Defendant. Assignment of Errors. J. D. Skeen, Corwin S. Shank, Attys. for Complainant. H. C. Edwards, Atty. for Defendant. Filed March 14th, 1914. T. J. Edwards, Clerk.

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,

Defendant.

Order [Extending Time to Prepare and File Statement of Evidence, etc.].

In the above-entitled cause, upon the application of the said defendant, it is hereby ordered that said defendant be and is hereby given to and including the 28th day of March, 1914, in which to prepare and file in said cause the record or statement of evidence

required by Rule 75 of the Equity Rules of 1912, for use on appeal to the United States Circuit Court of Appeals from the interlocutory decree heretofore made and entered in said cause; and it is further ordered that the said defendant be and is hereby **[314]** permitted to withdraw the depositions heretofore taken by John W. Christy at Salt Lake City, Utah, and filed in this court, to enable said defendant to prepare the record or statement of evidence aforesaid, the same to be returned to the clerk of this court at the time of filing said record or statement.

Dated March 14th, 1914.

E. S. FARRINGTON,
District Judge.

[Indorsed]: No. 1183. In the District Court of the United States in and for the District of Nevada. Charles D. Bates, Complainant, vs. Tenabo Mining and Smelting Company, a Corporation, Defendant. Order to Withdraw Depositions, etc. Filed March 14th, 1914. T. J. Edwards, Clerk.

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,
Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,
Defendant.

Stipulation [for Extension of Time for Presentation of Evidence, etc.].

It is stipulated by the parties hereto that the Court may enter an order in the above suit extending the time for the presentation of the statement of the evidence herein, prepared by appellant, under Equity Rule No. 75, from the 16th day of April, 1914, to and including the 4th day of May, 1914. And it is further stipulated that the Court may likewise make an order herein extending the time within which appellee may file objections or amendments to the statement of the evidence submitted by appellant, from the 16th day of April, 1914, to the 2d day of May, 1914.

Dated this 7th day of April, 1914.

J. D. SKEEN,
One of the Solicitors for Appellee.
H. C. EDWARDS,
Solicitor for Appellant. [315]

[Order Extending Time for Presentation of Statement of Evidence, etc.]

Pursuant to the above stipulation, it is ordered that the time for the presentation of the statement of the evidence by the appellant in the above-entitled suit be and the same is hereby extended from the 16th day of April, 1914, to the 4th day of May, 1914, and it is further ordered that the time for the proposing of objections or amendments by the appellee shall be and the same is hereby extended from the 16th day of April, 1914, to the 2d day of May, 1914.

Dated this 9th day of April, 1914.

E. S. FARRINGTON,
Judge.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Chas. D. Bates vs. Tenabo M. & S. Co. Stipulation and Order Enlarging Time to File Statement on Appeal. Filed April 9th, 1914. T. J. Edwards, Clerk.

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,
Complainant,

vs.

TENABO MINING AND SMELTING COMPANY, a Corporation,
Defendant.

Order Extending Time to File Record and Docket Case with Clerk of Circuit Court of Appeals.

On reading and filing the stipulation of the parties to said cause, it is hereby ordered that the time for the defendant and appellant, Tenabo Mining & Smelting Company, be and is hereby enlarged and extended to and including the 15th day of May, A. D. 1914, in which to file the record thereof and docket said case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By the Court:

E. S. FARRINGTON,
District Judge.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Chas. D. Bates vs. Tenabo M. & S. Co. Order Extending Time to File Record on Appeal. Filed April 9th, 1914. T. J. Edwards, Clerk. [316]

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING AND SMELTING COMPANY, a Corporation,

Defendant.

Order Extending Time to File Amendments and Objections to Statement of Evidence, to Present Statement, and to Docket Case with Clerk of Circuit Court of Appeals.

Pursuant to stipulation heretofore filed herein, it is ordered that the time for the presentation of objections or amendments by the appellee to the statement of evidence prepared by the appellant shall be and the same is hereby extended from the 2d day of May, 1914, to the 20th day of May, 1914; and it is further ordered that the time for the presentation of the statement of the evidence by appellant to the court or judge for approval, under Equity Rule No. 75, be and the same is hereby extended from the 4th day of May, 1914, to the 25th day of May, 1914, and it is further ordered that the time of the defendant and appellant, Tenabo Mining and Smelting Company, be and is hereby enlarged and extended to

and including the 15th day of June, 1914, in which to file the record thereof and docket the said case with the Clerk of the United States Court of Appeals for the Ninth Circuit in accordance with the provisions of Rule No. 16 of the said Circuit Court of Appeals.

By the Court:

E. S. FARRINGTON,
District Judge.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Chas. D. Bates vs. Tenabo M. & S. Co. Order Enlarging Time to File Amendments and to File Record on Appeal. Filed April 29th, 1914. T. J. Edwards, Clerk.

[Order Extending Time to File Record on Appeal.]

In the District Court of the United States for the District of Nevada.

No. 1183.

CHARLES D. BATES,
Plaintiff,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,
Defendant. [317]

Good cause appearing therefor, it is hereby ordered that the defendant have twenty days additional time within which to file the record on Appeal.

June 9th, 1914.

E. S. FARRINGTON,
U. S. District Judge.

[Indorsed]: No. 1183. U. S. Dist. Court, Dist. Nevada. Chas. D. Bates vs. Tenabo M. & S. Co. Order Enlarging Time to File Record on Appeal. Filed June 9th, 1914. T. J. Edwards, Clerk. [318]

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,

Defendant.

Praecipe [for Transcript of Record].

To the Clerk of the Above-entitled Court:

Will you kindly incorporate into the transcript of the record on appeal in the above-entitled cause the following portions of the record in your court in said cause:

1. All pleadings filed in said cause.
2. The condensed statement of the evidence in said cause as approved by the Court or the Judge thereof.
3. All opinions of the Court in said cause, if any.
4. All orders made and entered in said cause.
5. All decrees made and entered in said cause.
6. The petition for appeal in said cause.
7. The assignments of error in said cause.
8. The order allowing the appeal in said cause.
9. The bond made and executed by and on behalf of the defendant upon appeal in said cause.

10. The citation on appeal in said cause, together with proof of service thereof.

11. Certificate of the Clerk of said court as required by the rules of this Court and of the United States Circuit Court of Appeals for the Ninth Circuit.

H. C. EDWARDS,
Solicitor for Appellant.

I hereby acknowledge service of a copy of the foregoing praecipe this 4th day of March, A. D. 1914.

J. D. SKEEN,
Solicitor for Appellee.

[Indorsed]: No. 1183. U. S Dist. Court, Dist. Nevada. Chas. D. Bates vs. Tenabo M. & S. Co. Praecipe for Record on Appeal. Filed April 9th, 1914. T. J. Edwards, Clerk. [319]

In the District Court of the United States in and for the District of Nevada.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,

Defendant.

Citation [on Appeal (Original)].

United States of America to Charles D. Bates, Complainant in the Above-entitled Cause, and to J. D. Skeen and Corwin S. Shank, Attorneys for said Complainant:

You are hereby notified that in a certain case in

equity in the District Court of the United States in and for the District of Nevada wherein Charles D. Bates is complainant and Tenabo Mining & Smelting Company, a corporation, is defendant, an appeal has been allowed the defendant therein to the United States Circuit Court of Appeals for the Ninth Circuit, and you are hereby cited and admonished to be and appear in said Court sitting in the City of San Francisco, State of California, 30 days after the date of this citation to show cause if any there be why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable E. S. FARRINGTON, Judge of the District Court of the United States in and for the District of Nevada, this 13th day of March A. D. 1914.

E. S. FARRINGTON,
United States District Judge.

Service of the above citation is hereby accepted this 21st day of March, 1914.

J. D. SKEEN,
One of the Solicitors for Complainant.

[Endorsed]: No. 1183. In the District Court of the United States in and for the District of Nevada. Charles D. Bates, Complainant, vs. Tenabo Mining & Smelting Company, a Corporation. Citation. Filed March 31st, 1914. T. J. Edwards, Clerk.

In the District Court of the United States for the District of Nevada.

CHARLES D. BATES,

Complainant,

vs.

TENABO MINING & SMELTING COMPANY, a Corporation,

Defendant.

Clerk's Certificate to Transcript of Record.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing 321 typewritten pages, numbered from 1 to 321, both inclusive, are a true copy of the record, assignment of errors and all proceedings in the cause therein entitled.

I further certify that the cost of this record is $418.80, and that the same has been paid by the solicitor for defendant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at Carson City, Nevada, this 29th day of June, 1914.

[Seal] T. J. EDWARDS,
Clerk.

[Endorsed]: No. 2441. United States Circuit Court of Appeals for the Ninth Circuit. Tenabo Mining and Smelting Company, a Corporation, Appellant, vs. Charles D. Bates, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Nevada.

Received and filed June 30, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

No. 2441.

United States
Circuit Court of Appeals
For the Ninth Circuit.

APPELLANT'S BRIEF.

TENABO MINING AND SMELTING COMPANY, a Corporation,

Appellant,

vs.

CHARLES D. BATES,

Appellee.

Upon Appeal from the United States District Court for the District of Nevada.

BURDETTE, SALT LAKE

United States
Circuit Court of Appeals
For the Ninth Circuit.

No. 2441.

APPELLANT'S BRIEF.

TENABO MINING AND SMELTING COMPANY, a Corporation,

Appellant,

vs.

CHARLES D. BATES,

Appellee.

Upon Appeal from the United States District Court for the District of Nevada.

STATEMENT OF THE CASE.

This was a suit in equity tried in the Circuit court of the United States, Ninth Circuit, district of Nevada, upon the issues framed in the following complaint and answer, wherein Charles D. Bates was complainant and the Tenabo Mining & Smelting Company was defendant.

(Bill of Complaint, Filed October 2, 1911.)

To the Honorable Judges of the Circuit Court of the United States for the Ninth Judicial Circuit, District of Nevada:

Charles D. Bates, in behalf of himself and all other stockholders of the defendant Tenabo Mining and Smelting Company, who are similarly situated and who wish to join in this bill and bear their proportion of the expenses of this suit and become parties thereto, brings this, his bill of complaint, against the above-named defendant, and for cause of complaint your orator says:

I.

That he is a resident and citizen of the State of Utah, residing at Salt Lake City, in said State; that the defendant Tenabo Mining and Smelting Company, a corporation, is a corporation organized and existing under and pursuant to the laws of the State of Nevada, and is a resident and citizen of said State.

II.

Your orator says that he is now and has been since the incorporation of the defendant company, a *bona fide* stockholder thereof, owning and holding two hundred shares of its capital stock.

III.

Your orator further says that the subject matter of this suit is of a cash value exceeding two thousand dol-

lars and that this suit is not a collusive one to confer on this court jurisdiction of a case of which it would not otherwise have cognizance.

IV.

Your orator further says that the defendant was incorporated under the laws of the State of Nevada, on November 14, 1908, for the purpose of acquiring, owning and operating mining claims and mining property, and conducting a general mining business, with a capital stock of three million dollars, divided into one million five hundred thousand shares, of the par value of two dollars each, of which said amount three hundred thousand shares were issued to the Tenabo Consolidated Mines Company and four hundred and fifty thousand shares were issued to the Gem Consolidated Mining Company in payment of the purchase price of the mining claims hereinafter mentioned, and seven hundred and fifty thousand shares were placed in the treasury of the said company as treasury stock thereof.

V.

That immediately after the incorporation of the defendant company and in consideration of the transfer to it of three hundred thousand shares of the capital stock of the defendant company, the Tenabo Consolidated Mines Company conveyed to the defendant the following mining claims, to-wit: Two Widows, Two Widows Extension, Copper Hill Group and Nevada Phoenix; and

in consideration of the transfer to it as above stated of four hundred and fifty thousand shares of the defendant company, the Gem Consolidated Mining Company transferred to the defendant the mining claims known as Little Gem, Ollie, Reno, and Winnemucca; all of which said mining claims are located in Lander County, Nevada. That at the time of the transfer of the said property from the Gem Consolidated Mining Company the same were incumbered with a mortgage of fifteen thousand dollars.

VI.

That during November and December, 1908, and during the year 1909, the defendant company caused to be sold and disposed of from the treasury of said company, about three hundred thousand shares of its treasury stock, the exact amount thereof being to your orator unknown, for the sum of about twenty-seven thousand dollars, the exact amount of which said sum is to your orator likewise unknown; that the only source of income which the defendant has had has been from the sale of its treasury stock, the said mining claims being undeveloped property and yielding no income whatsoever.

VII.

That in the year 1908, by reason of the failure of the defendant company to pay the mortgage due and owing as hereinabove set forth, the same was foreclosed, but before the sale of the said property under said foreclosure

proceedings, sufficient funds were realized from the sale of treasury stock with which to pay the said mortgage and the accrued interest and expenses thereof, which aggregated approximately twenty thousand dollars, the exact amount being to your orator unknown.

VIII.

Your orator is informed and believes, and therefore alleges the fact to be, that for more than two years last past, the defendant has had no income whatsoever. That it has been totally without funds. That on December 13th, 1910, it was obliged to borrow fifteen hundred dollars from one W. H. Sherman, with which to pay for the assessment work upon the said mining claims, and that to secure the payment of the said money so borrowed, it executed a mortgage to the said Sherman upon all its property and assets, which said mortgage, as your orator is informed and believes, is now due and unpaid; that all the money realized from the sale of the capital stock of the defendant company has been expended in the payment of obligations which were just and due, together with the payment of certain fees and allowances to the officers and board of directors of the defendant company.

IX.

That owing to the undeveloped condition of the property of the defendant and the incumbrance thereon, and the impecunious condition of the defendant, the four

hundred and fifty thousand shares of treasury stock yet remaining with the company has no market value and nothing can be realized thereon; that the assessment work for 1911 has not yet been performed and the defendant company has no money with which to pay for the same. That there are many obligations now due and owing from the defendant company to various creditors, and the defendants is in imminent danger of having instituted a multiplicity of suits against it, and its property and assets dissipated. That the officers and agents of the defendant company have acknowledged openly and repeatedly that it is insolvent. Your orator is informed and believes that said mortgage is about to be foreclosed upon said property, in which event, all of the assets of the said defendant company would be sold for the payment thereof and the unsecured creditors left without resource for the payment of their claims. That the defendant is insolvent.

X.

Your orator further says that the defendant company has never been a going concern in any proper sense thereof, as defined and specified in its articles of incorporation. That from the beginning, the only business that it has transacted was to do the necessary assessment work upon its mining prospects for the years 1909 and 1910, and to attempt to sell its treasury stock and make application of the proceeds therefrom.

IX.

Your orator further says that the present board of directors or those whom they represent by proxy or other appointment hold a majority of the capital stock of the defendant company and have so held said control since the incorporation thereof. That the affairs of said company have been grossly mismanaged in the following particulars, to-wit: That beginning two months after the incorporation of the defendant company, it contracted to and did pay as long as it had funds, to its board of directors and certain other officers and agents, a stipulated monthly salary, notwithstanding the fact that said board of directors and officers and agents performed little or no service for the said defendant company; that in the sale of said three hundred thousand shares of treasury stock, or thereabouts, it paid grossly inadequate commissions either to those who were then upon the board of directors or to others who held large and controlling stock interests in said company; that in making on March 15th, 1910, with one Pepton B. Locker and with one John Janney, the former of whom was a heavy stockholder and the latter of whom was the Secretary of the defendant company, a contract for the sale of all the treasury stock of the defendant company upon a basis that promised to yield to the company no return whatsoever; that in making no provision for the payment of the mortgage now due and owing upon the said property; for making no provision whatsoever for the payment of any of the

just obligations due and owing by the defendant, and in keeping no adequate books of account showing the financial transactions of the defendant company.

X.

Your orator further says that owing to the insolvency of the company and the mismanagement thereof, he has no plain, speedy and adequate remedy at law.

IN CONSIDERATION WHEREOF, and as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant, if it can, show why your orator should not have the relief herein prayed, and make a full disclosure and discovery of all the matters aforesaid according to the best and utmost of its knowledge, information and belief, full, true, correct and perfect answer make to all the matters herein stated and charged, but not under oath, answer under oath being hereby expressly waived, your orator prays:

1. That a receiver be appointed by this court to take charge of all of the assets of said corporation located within the State of Nevada, including all books, records, papers and documents of every name, nature and description, and sell and dispose of all the property and assets of the said defendant company under the guidance and direction of this court, and wind up the affairs of the company, and from the proceeds derived from the sale thereof, pay the expenses of said receivership, including a reasonable allowance of as solicitors' fees for

the bringing of this complaint, and distribute the balance to the stockholders of the defendant as their interests may appear.

2. Your orator further prays for such other and further relief in the premises as may be just and agreeable to equity.

MAY IT PLEASE YOUR HONORS to grant to your orator a writ of subpoena to be directed to the said defendant Tenabo Mining and Smelting Company, commanding it at a time certain, and under a penalty therein to be limited to personally appear before this Honorable Court, and then and there, full, true, direct and perfect answer make to all and singular the premises; to state, perform and abide by such order, direction and decree as may be made against it in the premises, and shall seem meet and agreeable to equity.

ANSWER TO ORIGINAL BILL OF COMPLAINT.

The answer of Tenabo Mining & Smelting Company, defendant, to the bill of complaint of Charles D. Bates, complainant:

This defendant now and at all times hereafter saving to itself all and all manner of benefit for advantage, exception or otherwise that can be made to, had or taken to the many errors, uncertainties, imperfections in said bill contained for answer thereto or to so much thereof

as this defendant is advised it is material or necessary for it to make answer to, answering:

1. Denies that this suit is not a collusive one to confer on said court jurisdiction of an action of which it would not otherwise have cognizance of.

2. Admits that the defendant corporation was incorporated under the laws of the State of Nevada, on November 14th, 1908, for the purposes, among others, of acquiring, owning and operating mining claims and mining properties, and conducting a general mining business, with a capital stock of three million dollars divided into one million million five hundred thousand shares of the par value of two dollars each, of which said amount three hundred thousand shares were issued to the Tenabo Consolidated Mines Company and four hundred and fifty thousand shares were issued to the Gem Consolidated Mining Company in payment for the purchase price of its mining claims. Admits that seven hundred and fifty thousand shares of the capital stock of said company were placed in the treasury of said company as treasury stock thereof, and this defendant states that the directors of said company were under the articles of incorporation and by-laws thereof, authorized to sell said treasury stock, or such portion thereof as in the discretion of said board of directors shall deem for the best interests of the corporation for the purpose of creating funds wherewith to transact the business and business af-

fairs of said corporation, and that 167,250 shares of said treasury stock is all of the same that has been sold and that the remaining portion thereof remains in the treasury of said corporation subject to sale.

3. Admits that immediately after the incorporation of said defendant company, the Tenabo Consolidated Mines Co., in consideration of the transfer to it of three hundred thousand shares of the capital stock of the defendant corporation conveyed to said defendant corporation all of its right, title and interest in and to the following named lode mining claims, situate in the Bullion Mining District, Lander County, Nevada, to-wit: Two Widows, Two Widows Extension and Copper Hill, and also all its right, title and interest in and to a certain bond and lease upon the Nevada Phoenix group of mining claims situate in the same mining district and the Gem Consolidated Mining Company, in consideration of four hundred and fifty thousand shares of the capital stock of the defendant corporation, transferred to the defendant corporation all of its right, title and interest in all of the Little Gem lode mining claim and also all of its right, title and interest in and to certain contracts and deeds in escrow for the acquisition of the location title to the Ollie, Reno and Winnemucca lode mining claims situated in the same mining district; but this defendant denies that at the time of said transfer any of said mining claims conveyed by said Gem Consolidated Mining Company other than

the Little Gem were encumbered with a mortgage in the sum of fifteen thousand dollars or any other sum whatsoever, and further, this defendant states that in the month of October, 1907, the Reliance Mining & Milling Company, being then the owner of the location title to the said Little Gem lode mining claim, executed and delivered a mortgage upon said mining claim to McCornick & Co. of Salt Lake City, Utah, to secure the payment of a note in the sum of fifteen thousand dollars, executed by Reliance Mining & Milling Company as maker and payable to McCornick & Co. as payee; that thereafter the said Reliance Mining & Millling Company conveyed all of its right, title and interest in and to said mining claim to the Gem Consolidated Mining Company and that in the month of October, 1908, said promissory note not having been paid, suit was instituted by McCornick & Co. in the Third Judicial District Court of the State of Nevada in and for the County of Lander against the Reliance Mining & Milling Company to foreclose said mortgage and at the time of the transfer by said Gem Consolidated Mining Company of all of its right, title and interest in and to said Little Gem lode mining claim to said defendant corporation, said note had not been paid and said suit for the foreclosure of the mortgage given to secure the said note was then pending and undisposed of in the court in which it had been instituted and said transfer was made by said Gem Consolidated Mining

Company and accepted by this defendant corporation subject to the lien of said mortgage.

4. This defendant admits that during the months of November and December, 1908, and during the year 1909, the defendant company caused to be sold and dispose of from the treasury of said company 167,250 shares of its capital stock; but denies that said company during said year or thereafter, or at all, sold and disposed of three hundred thousand shares of its treasury stock or any amount in excess of 167,250 shares, and this defendant admits that for the sale of said shares of treasury stock it realized the sum of $26,687.50. This defendant admits that the only source of income which the defendant has had has been from the sale of its treasury stock, but denies that said mining claims are undeveloped property, but admits that up to the present time the same have yielded no income whatever, but this defendant states that prior to the time when the above described mining claims were conveyed by the Tenabo Consolidated Mines Company and the Gem Consolidated Mining Company to this defendant much development work had been done upon the same and large deposits of milling ore had been developed thereon in, to-wit: more than seventeen thousand tons of a net value in excess of $171,000.00.

5. Denies that in the year 1908, or at any other time or at all, by reason of the failure of the defendant company to pay the mortgage due and owing as set forth in

plaintiff's complaint, the same was foreclosed, but, on the contrary, this defendant states that the proceeding to foreclose said mortgage had been instituted and was pending at the time of the conveyance by the Gem Consolidated Mining Company of the Little Gem, Ollie, Reno and Winnemucca lode mining claims to this defendant corporation, but this defendant admits that before the sale of said property under said foreclosure proceedings and before final hearing upon said proceedings sufficient funds were realized from the sale of treasury stock by said defendant corporation with which to pay the indebtedness secured by said mortgage and to procure a release of said mortgage, but this defendant denies that said indebtedness at the time of the payment thereof exceeded the sum of $19,885.45.

6. This defendant admits that for more than two years last past said defendant has had no income whatever, but denies that it has been without funds. Admits that on December 13, 1910, it was obliged to and did borrow $1,500.00 from one W. H. Shearman with which to pay for the annual assessment labor performed upon the mining claims owned by it, and that to secure the payment of said money so borrowed it executed a mortgage to the said Shearman upon all of its property and assets except the Copper Hill group, and denies that said mortgage included said Copper Hill group of mining claims; admits that said mortgage is unpaid, but denies

that the same is due, and on the contrary this defendant states that the time of the payment of said promissory note for which said mortgage was given as security has been extended by said Shearman, and this defendant states that its assets are of sufficient value to enable it to borrow sums of money far in excess of the amount due upon said promissory note, and in addition thereto all debts due and owing by said defendant with which to liquidate its present indebtedness. This defendant admits that all money realized by it from the sale of its capital stock has been expended in the payment of obligations which were just and due, together with the payment of certain and all fees and allowances to its officers and board of directors, but this defendant alleges that all of said fees and allowances were legal and just claims against said corporation.

7. This defendant denies that owing to the undeveloped condition of the property of the defendant, or to the encumbrances thereon, or to the impecunious condition of the defendant, or by reason of any other matter or thing whatsoever, the number of shares of stock now remaining in the treasury of said corporation has no market value, or that nothing can be realized thereon, but, on the contrary, this defendant states that said treasury stock is of a value in excess of fifty cents per share, and that said treasury stock and all of the same could have been sold by said defendant and would have

been sold by it had it not been for the wrongful acts of this plaintiff as hereinafter alleged.

8. Defendant admits that the assessment labor for the year 1911 has not yet been performed and that the defendant company has no money in its treasury with which to pay the same; but this defendant alleges that it is now making arrangements to and will cause the annual assessment labor for the year 1911 to be commenced in the immediate future and performed as by law required, and that it can and will procure funds through the sale of its treasury stock, or by other legitimate means, wherewith to pay for and liquidate all expenses incurred in the performance of said labor.

9. This defendant denies that there are many or any obligation of said corporation now due and owing by it to various or any creditors, except this defendant states that there are obligations now contracted for which it is liable in the sum of about $8,297.75, and no more. This defendant denies that it is in imminent or any danger of having instituted a multiplicity or any suits against it or of having its property and assets or any of the same dissipated. Denies that its officers or agents, either with or without authority, acknowledged openly or repeatedly or at all that it was insolvent, and, on the contrary, this defendant alleges that it is not insolvent, and denies that said mortgage is about to be foreclosed upon said property, and denies that in the event of such foreclosure all

or any of the assets of said defendant corporation would be sold for the payment thereof or that the unsecured creditors would be left without recourse for the payment of their claims, but, on the contrary, this defendant alleges that it has sufficient assets with which to pay all of its liabilities, and this defendant denies that it is insolvent or in imminent or any danger of insolvency.

10. This defendant denies that it has never been a going concern in any proper sense thereof as defined and specified in its articles of incorporation, and, on the contrary, alleges that it has transacted such business as it deemed proper and to the best interests of said corporation and its stockholders, and that any delay or interruption in the transaction of its business affairs has been caused through the wrongful acts of said plaintiff as hereinafter set forth, and this defendant denies that from its beginning the only business that it was transacting was to do the necessary assessment work upon its mining prospects for the years 1909 and 1910 and to attempt to sell its treasury stock and make application of the proceeds thereon, but, on the contrary, this defendant alleges that it has transacted all business which its board of directors deemed for the best interests of itself and its stockholders.

11. This defendant admits that the members of the present board of directors, together with those whom they represent as proxy for the purpose of voting at the annual stockholders' meeting or adjournments thereof, hold

a majority of the capital stock of the defendant company, but denies that they have held such control since the incorporation thereof or for any purpose except for the annual stockholders' meeting provided to be held in the year 1911 and the adjournments thereof. And this defendant denies that the affairs of said company, or any of the same, have been grossly or at all mismanaged, in that beginning two months after the incorporation of said company it contracted to and did pay so long as it had funds to its directors or certain other officers or agents a stipulated monthly salary, notwithstanding the fact that said board of directors, officers and agents performed little or no service for said defendant company, or in that in the sale of said 300,000 shares of the treasury stock as alleged in plaintiffs' complaint or any of the same, it paid grossly or any inadequate commissions either to those who were then upon the board of directors or to others who held large or controlling interests in said company, or in that in making on March 15, 1910, with one Peyton B. Locker or with one John Janney a contract for the sale of all of the treasury stock of said defendant company, or that in the making no provision for the payment of the mortgage alleged by said plaintiff to be due and owing upon said property, or in that having made no provision whatever for the payment of any of the just obligations due and owing by said defendant as alleged in said plaintiff's complaint and not keeping adequate books of account showing the financial

transactions of the defendant company as alleged in plaintiff's complaint, but, on the contrary, this defendant states that all monthly salaries paid by it to its board of directors and other officers and agents were paid and received in pursuance of resolutions of its board of directors theretofore duly adopted at meetings thereof duly called and held, and that each and every of said payments were made for services actually performed by the parties to whom the same were paid, and denies that said payment or any of the same were made for little or no service performed by the parties to whom the same were paid; and this defendant further states that said payments and each of them were made by officers and directors of this corporation who have ceased to be such for more than one year last past, and none of the present officers or directors of said corporation participated either in the making of such payments or in the receipt thereof, except that the present board of directors have caused to be made a payment of $200.00 to John Janney, the present Secretary of said corporation, to apply upon account for services performed by him as secretary of said corporation. And this defendant further states that all of its treasury stock heretofore sold has realized to this corporation in cash all that its said stock was reasonably worth to this corporation at the time of the contracting for the sale hereof, and that none of the parties selling any of the same have on behalf of this corporation received grossly or inadequate commissions

for the sale thereof, and that none of said commissions were ever paid to members of its board of directors or officers or to any other party or parties who held controlling stock interests in said company, or in any way dominated its business affairs or its board of directors.

12. This defendant further states that in the month of March, 1910, Peyton B. Locker was a stockholder in said defendant corporation to the amount of 61,618 shares and no more, so far as shown by the books of this defendant, and this defendant has no knowledge as to whether or not said Peyton B. Locker at said time owned any other or further shares of stock and therefore denies the same, and this defendant admits that the said John Janney was at the date of the execution of said contract by it to the said Peyton B. Locker, the secretary of said defendant, and admits that it entered into a contract with the said Peyton B. Locker in the month of March, 1910, for the sale of certain of its treasury stock, but denies that said contract was for the sale of all its treasury stock or any amount thereof in excess of 450,000 shares, and denies that the sale of said treasury stock under said contract promised to yield to the company no returns whatever, but, on the contrary, defendant alleges that said contract, if performed according to its terms of necessity, would have furnished to said defendant the reasonable value of the stock which it contracted to sell, and this defendant states that said contract was

in writing, a copy thereof being hereto attached, marked Exhibit I and made a part of this answer. This defendant admits that it has not procured funds wherewith to pay the promissory note secured by the mortgage given to the said W. H. Shearman, but alleges that it has sufficient assets wherewith to procure funds with which to liquidate said indebtedness in the event it fails to sell sufficient of its treasury stock for that purpose before demand is made for the payment of said promissory note, and this defendant further states that had it not been for the wrongful acts of said plaintiff as hereinafter related, said defendant would have procured from the sale of its treasury stock a sum of money far in excess of that needed for the payment of said mortgage, as well also as for the payment of all other just obligations due and owing or to become due and owing by it, and this defendant denies that it has not kept adequate books of account showing the financial transactions of said defendant company, but, on the contrary this defendant states that it has kept all such books of account as its officers and directors deemed necessary and sufficient for the purpose of keeping informed as to its business transactions.

13. This defendant denies that owing to its insolvency as alleged in said plaintiff's complaint or of its mismanagement, or by reason of any other matter or thing whatsoever, plaintiff has no plain, speedy or adequate remedy at law.

14. And for further answer to plaintiff's complaint, this defendant states that on the 22d day of March, 1910, it entered into a contract in writing with Peyton B. Locker, otherwise known as P. B. Locker, a copy of which is attached to this answer as Exhibit 1; that immediately thereafter the said P. B. Locker entered into an active campaign for the purpose of selling the treasury stock of this defendant corporation under the provisions of said contract and diligently pursued performance under said contract down to the time when said plaintiff instituted proceedings in this court against this defendant corporation as hereinafter alleged, and in so doing expended large sums of money and procured parties who were able, ready and willing to pay to this corporation the sum of fifty cents per share net for more than 40,000 shares of its said treasury stock, and this defendant is informed and believes, and therefore alleges the fact to be, that said parties are still ready, able and willing to purchase large blocks of said treasury stock at said price when the sale of said stock can be made by this defendant without any question pending in the courts as to the right of said corporation to sell the same under the provisions of said contract Exhibit 1 hereto attached, or as to the solvency of said corporation.

15. That on the 29th day of May, 1911, this plaintiff filed in this court an action wherein he was complainant and this defendant corporation was defendant, a copy of which said complaint is hereto attached, marked Exhibit 2 and made a part of this answer; that said suit

continued to pend in said court from the date of its filing to the second day of October, 1911, at which time an order was entered, dismissing said bill of complaint upon the application of said plaintiff; that said defendant believing that the issues presented by said complainant presented a question as to the right of this corporation to sell its treasury stock or any of the same under the provisions of said contract between this defendant and said P. B. Locker, refused to sell any of its said treasury stock until the issues presented by said bill of complaint were disposed of and the parties procured by the said P. B. Locker under the provisions of his said contract who were able, ready and willing to purchase shares of stock before the filing of said complaint, refused to purchase any of the same until such time as the issues of said complaint were disposed of.

16. That immediately after dismissing said bill of complaint set forth in Exhibit 2 here to attached, said plaintiff caused to be filed a bill of complaint in this action now pending between plaintiff and defendant, and that by reason of the bringing and prosecution of said suits and not otherwise, this defendant has been unable to sell sufficient of its treasury stock with which to pay its present indebtedness, and this defendant further states that about the time of its incorporation it caused the workings in its said mining properties to be thoroughly examined by mining engineers and a report to be made by them as to the ore reserves and deposits con-

tained in said properties and exposed by the workings thereon, to the end that it might adopt a policy in handling the ore deposits in said properties best calculated to further the interests of said corporation and its stockholders; that said mining engineers recommended that a mill or smelter be erected to treat and reduce the ores containd in said properties and that by so treating and reducing said ores the same could be done at a substantial profit to said corporation, while said ores could not be shipped to a smelter and the costs and expenses of transportation paid without concentration or reduction at a profit, and upon investigation this defendant discovered that it had large and substantial deposits of ore developed from which substantial profits could be procured by treating and reducing the ores at the property and shipping the concentrates or matte therefrom, but that profit could not be procured from the shipment of said ores in their crude state, and thereupon it decided to sell sufficient of its treasury stock with which to create funds for the construction of a smelting plant or concentrating mill at or near its property for the reduction and treatment of the ores therein contained, and the said contract with the said P. B. Locker, a copy of which is attached to this answer, as Exhibit 1, was entered into by this defendant in an endeavor to sell sufficient of its treasury stock to create the necessary funds with which to construct such smelter or mill, and had it not been for the bringing and prosecution of said suits by said plaintiff as hereinabove

set forth, said defendant would have sold sufficient of its treasury stock at the reasonable value thereof with which to have created funds for the construction of said smelter or mill, and this defendant is informed and believes, and therefore alleges the fact to be, that it could now and can in the immediate future sell sufficient of its treasury stock with which to construct and operate a smelter or mill for the reduction of the ores in its said properties when its right under the provisions of said contract with P. B. Locker to sell said treasury stock is no longer being litigated in court.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by said bill charged, without this, that there is any other matter, cause or thing in said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer to and not herein or hereby well and sufficiently answered, confessed, traversed, avoided or denied, is true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as *to* this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

TENABO MINING & SMELTING CO.

(Seal) By JOHN JANNEY,
Its Secretary.

H. C. EDWARDS,
Counsel for Defendant.

EXHIBIT 1 (TO ANSWER—AGREEMENT DATED MARCH 22, 1910, TENABO MINING & SMELTING CO.—P. B. LOCKER.

THIS AGREEMENT made and executed this 22nd day of March, 1910, by and between Tenabo Mining & Smelting Company, a Nevada corporation, hereafter called the Company, and P. B. Locker of Salt Lake City, Utah, hereinafter called the Agent, witnesseth:

WHEREAS, the Company has four hundred and fifty thousand shares of its capital stock remaining in its treasury with which to provide funds for the development and operation of its properties, and the erection of reduction plants, and,

WHEREAS said P. B. Locker is desirous of undertaking the sale of said stock and represents and believes that he can sell a portion of this stock in France or elsewhere, provided the necessary authority be given him to negotiate and execute a contract on behalf of the Company and to list the stock upon a French Banking Market, or other markets;

NOW, THEREFORE, for and in consideration of the mutual obligations herein imposed and the sum of one dollar interchangeably paid, the said P. B. Locker agrees and undertakes to provide and furnish all the fees and expenses for the listing of each one hundred fifty thousand shares of stock provided for in a Special Power of Attorney set forth in the Minutes of the Company, and

all other expenses required by the law of France or elsewhere, and all trustee's fees and expense, and he further agrees at his own expense to go to Paris in the interest of this Company and use diligent effort to negotiate said contract.

In consideration thereof the Company hereby appoints said P. B. Locker its agent and attorney in fact under a special power of attorney hereinafter referred to dispose of four hundred fifty thousand shares of its capital stock now remaining in the treasury, and the Company agrees to duly authorize said P. B. Locker by special power of attorney to make and execute on behalf of the Company, a contract in terms and effect as set out in the said special power of attorney.

The company further agrees that should said P. B. Locker successfully negotiate said contract, it will pay to the said P. B. Locker for his services from the moneys realized from the sale of said stock, but not otherwise, all in excess of the sum of fifty cents per share, said compensation to said Locker being conditional not only upon the negotiation of said contract, but upon the receipt by the Company of the purchase price of said stock.

It is mutually agreed that the entire amount of money received from the sale of said stock shall be deposited to the credit of the Company upon the delivery of certificates of stock.

It is expressly understood and agreed that the Com-

pany shall in no way be liable for any fees or expenses for the listing of said stock, or trustees fees and expenses, or any other expenses whatsoever, and that each and every share of stock so sold shall net the Company fifty cents per share.

From the first money received from the sale of stock, the Company shall pay the said Locker the first fifteen thousand dollars advanced to pay taxes and dues for listing the stock on the French market and the three thousand dollars fees to the Trust Company. The Company shall, however, be reimbursed said amounts from the moneys received from the sales in excess of said amounts before said Locker shall be entitled to any compensation, the intention being that each and every share of stock sold shall net the company fifty cents per share. Should the sale of stock be not sufficient to net the company fifty cents per share, the said Locker agrees to reimburse the Company in stock out of his personal stock in an amount equal to the amount taken from the treasury and for which the Company has not received fifty cents net per share.

The time allowed said Locker for the carrying out of this contract shall be as follows:

Sixty days within which to furnish satisfactory proof that the Company has entered in contractual relations with reliable persons whereby the sum of $15,000.00 will be furnished to the agent as needed for listing. Then

ninety days to effect his negotiations in Paris or elsewhere and procure the execution of a satisfactory contract as set out in said special power of attorney, provided that in computing these periods of time, the months of June, July and August shall be excepted because of the summer season.

Nothing in this contract shall be construed to require the agent to sell any of the said stock in France, but on the contrary he may negotiate the sale of the said stock at any other place or places desired by him.

And thereupon the following decree was entered:

DECREE.

This cause came on regularly to be heard and was argued by counsel for the respective parties, and upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED:

I.

That J. P. Raine, of Pine Valley, State of Nevada, be and he is hereby appointed receiver of the Tenabo Mining & Smelting Company, defendant herein, a corporation organized under and pursuant to the laws of the State of Nevada, and said receiver is hereby authorized and directed forthwith to take possession of all of the real and personal property of said corporation located within the State of Nevada, including all books,

papers and documents of every name, nature and description, and particularly the following mining claims: Little Gem, Ollie, Reno, Winnemucca, Two Widows, Two Widows Extension, Copper Hill Group and Nevada Phoenix, together with all machinery, tools, appliances and other personal property located upon or used in connection with said mining claims, all of which said property is located in Lander County, State of Nevada.

II.

To examine, or cause the books and records of the defendant Tenabo Mining & Smelting Company to be examined, and from said books and from such other sources of information as may be available, to ascertain

(a) The authorized capitalization of said corporation, the number of shares issued and outstanding on the first day of October, 1912, and the number of shares in the treasury of said corporation on said date; also whether or not stock has been issued and sold by the officers and agents of said corporation since said date, and if so, to whom and for what consideration.

(b) To ascertain from said books and otherwise the money on hand on the 1st day of October, 1912, if any, and the nature and amount of the indebtedness of said corporation, to whom and when payable, and whether in money or in stock of said corporation, also whether or not any indebtedness has been incurred by the officers

and agents of said corporation since the 1st day of October, 1912; and if so, the nature, amount and consideration of said indebtedness.

III.

To sell for cash at public sale all of the real and personal property of said corporation, and particularly the following mining claims located in Lander County, State of Nevada, to-wit Little Gem, Ollie, Reno, Winnemucca, Two Widows, Two Widows Extension, Copper Hill Group and Nevada Phoenix, together with all machinery, tools, and appliances, and all other property owned by said corporation and located in the State of Nevada, said sale to be made upon said premises at Tenabo in Lander County, State of Nevada, it appearing to the court that it is best to sell the said personal property in the manner hereinabove specified, provided that said receiver shall first gave notice of said sale by publication thereof for at least once a week for four weeks prior to said sale, in a newspaper printed, regularly issued, and having a general circulation in Lander County, State of Nevada, if any such there be; and if there be no such newspaper published in said Lander County; or if the receiver in his discretion shall consider some other paper more advantageous, then the publication shall be in such paper so specified or selected, and having a general circulation in the State of Nevada, and said notice shall specifically describe the real and personal property to be sold. Pro-

vided, that said property shall not be advertised for sale, nor sold, until after the lapse of ninety (90) days from date hereof; nor until the further order of the court fixing the time of sale, and other conditions, if any, that the court may deem proper.

IV.

Said receiver is hereby directed to give notice to all creditors by publishing such notice in the ———, once a week for four consecutive weeks, directing all creditors to file their verified claims with the receiver at an address to be specfied, within (90) days from the date of the first publication of such notice; and that all claims not so filed shall be barred; and shall likewise mail a copy of said notice to each known creditor, provided that before the presentation of any claims for the approval of this court, notice thereof, with a list of such claims, shall be served upon the attorneys of record herein.

V.

Said receiver is hereby directed to keep a complete record of his doings in the premises, including an inventory of all property received, held, or sold; all money expended and debts incurred, and at the earliest practicable date report fully to this court the exact status and condition of the affairs of said corporation, and of his administration thereof.

The said receiver is further directed to hold all cash received from any source, to be disbursed under the or-

ders of this court, for the payment of expenses of this receivership, including such reasonable allowances as solicitors' fees and expenses for bringing this action as the court may deem proper, and distribute the balance under the orders of this court.

VI.

That before entering upon the performance of his duties as such receiver, said J. P. Raine shall take an oath of office to faithfully perform and discharge his duties, and execute and deliver to the clerk of this court a good and sufficient undertaking, conditioned as provided by law, in the penal sum of $7,500.00, payable to the clerk of this court, the court hereby reserving the right to increase said bond at any time.

Dated this 14th day of February, A. D. 1914.

E. S. FARRINGTON,
District Judge.

By the issues in this case, it is admitted that the defendant corporation was organized with an authorized capital stock of $3,000,000.00, divided into 1,500,000 shares of the par value of $2.00 each, of which amount 300,000 shares were issued to the Tenabo Consolidated Mines Company, 450,000 shares issued to the Gem Consolidated Mining Company in payment for the purchase price of their mining claims, and that 750,000 shares of the capital stock of said company were placed in its treasury (9) and that immediately after the incorpora-

tion of said company it acquired title in exchange for the shares of stock transferred by it to the Tenabo Consolidated Mines Company and Gem Consolidated Mining Company to the Two Widows, Two Widows Extension, Copper Hill, Little Gem, Reno, Ollie and Winnemucca lode mining claims, situated in the Bullion Mining District, Lander County, Nevada, (10).

That during the months of November and December, 1908, and during the year 1909, said defendant company sold and disposed of 167,250 shares of its treasury stock and that no other stock has been sold from its treasury, and that it received from the sale of its said treasury stock $26,687.50, and that its only source of income has been from the sale of its treasury stock, and that said property has yielded no income (11) and that at the time when said corporation acquired the title to said mining claims there existed against one thereof a mortgage for $15,000.00 in favor of McCornick & Co. (10) and that proceedings had been instituted for the foreclosure of said mortgage on said mining claims before the conveyance of said mining claims to said defendant corporation (11). That before the sale under said foreclosure proceedings was had said defendant corporation paid the amount due upon said mortgage from funds in its treasury received from the sale of its treasury stock (12).

On the 13th day of December, 1910, said company borrowed the sum of $1,500.00 from one W. H. Shearman

with which to pay for the annual assessment labor performed upon said mining claims, and to secure the payment thereof, it executed a mortgage upon certain of its mining claims, and that the amount due upon said mortgage has not been paid. That all money realized by it from the sale of its capital stock has been expended in the payment of its obligations (12).

That Peyton B. Locker owns 61,618 shares of the stock of the defendant corporation, and that John Janney was the secretary of said defendant corporation in the month of March, 1910, (15) and that said defendant company had not procured funds wherewith to pay the Shearman mortgage (16).

The evidence in this case shows substantially the following facts:

That on the 5th day of February, 1910, John Janney, Benner X. Smith, E. O. Howard, W. Mont Ferry and John Pingree were elected irectors of said defendant corporation (198-199-200) and these directors continued to serve as such at all times mentioned in plaintiff's complaint. (51).

That on the 22nd day of March, 1910, said defendant corporation entered into a contract with Peyton B. Locker wherein said Locker was appointed as attorney for said company to dispose of 450,000 shares of its capital stock remaining in its treasury, and said contract provided that: Whereas said Locker represented and be-

lieved that he could sell a portion of said stock in France and elsewhere provided the necessary authority be given him to negotiate and execute a contract on behalf of the company, and to list the stock upon the French banking market, that if the said Locker successfully negotiated said contract the company would pay to him for his services from moneys realized from the sale of said stock and not otherwise all sums in excess of 50 cents per share; said compensation to the said Locker to be conditional not only upon the negotiation of said contract, but upon the receipt of the purchase price of the stock, and that said company should in no way be liable for any fees or expenses for the listing of said stock, or trustee's fees or expenses, or any other expenses whatsoever; that from the first money received from the sale of stock the company would pay to said Locker $15,000.00 advanced to pay taxes and dues for listing said stock on the French market, and $3,000.00 fees to the trust company, but that the company should be reimbursed said amounts from the money received from sales in excess of said amount before the said Locker should be entitled to any compensation, and that the said Locker was to have the following time for carrying out said contract; sixty days within which to furnish satisfactory proof that the company had entered into contractual relations with reliable persons whereby the sum of $15,000.00 would be furnished the agent for listing and ninety days to effect his negotiations in Paris or elsewhere (20) and procure the execu-

tion of said contract as set out in said special power of attorney. That thereupon said company entered into a contract with the Windsor Trust Company whereby said trust company agreed that upon the depositing with it of certain certificates of stock in said defendant corporation for not less than 450,000 shares of its capital stock, with the transfers endorsed thereon or annexed thereto, said trust company would act as trustee and would issue in exchange therefor and deliver, pursuant to the order of the board of directors, stock trustee's certificates with dividend coupons annexed thereto for a number of shares equal to the number of shares of stock deposited with said trust company; that said trustee's certificates were to the effect that the bearer thereof, upon the surrender of said certificates and the unpaid dividend coupons issued on account thereof, is entitled to a certificate (for a like number of shares) at two dollars each of the capital stock of the Tenabo Mining & Smelting Company, the same having been deposited with said trust company for the bearer of said trustee certificates, and providing further for the payment of dividends to the representative of the holder of said certificate as in said trustee's certificate provided (242). That 450,000 shares of the stock of the defendant company referred to in the contract with Locker were deposited with said trust company (121).

Mr. E. O. Howard, cashier of Walker Brothers Bank, of Salt Lake City, Utah, the treasurer of said defendant

corporation, testified that on November 17, 1910, Walker Brothers Bank, of which he was cashier, received between $2,900.00 and $3,000.00 as a telegraphic transfer paid through the Utah National Bank under instructions from their New York correspondent, and that it was received from Mr. Locker (104); that said money was disbursed in taking care of the business affairs of said corporation (110-114).

Numerous letters passed between P. B. Locker and John Janney (256, 259, 261, 265, 267, 271, 272, 282, 283, 286, 289, 295), and numerous letters also passed between said Locker and the defendant corporation (266, 275, 280, 295, 296), and also letters were written by Andre L. Picard to John Janney (301), and one written by J. Coleman to Andre Picard (301), and from said letters it appears that Mr. Locker had expended a great deal of money in complying with the laws of France in reference to the sale of mining stocks in that country, a detailed statement of which appears at pages 277 and 278 of the record which shows that said expenses aggregated 78,-045.61 franks. That Locker had entered into a contract with French banking institutions in reference to the sale of said trustee's certificates on the basis of two dollars per share and that the sale under said arrangement was about to be consummated when this action was instituted.

Numerous meetings of the directors of said corporation were held after the 5th day of February, 1910, the

minutes of said meetings appearing in the record on pages 199, 201, 206, 213, 219, 220, 221, 222, 227, 228, 229, 230, 231, 232, 233 and 234, from which it appears that said directors had many meetings in which they were transacting the business of the corporation and from said minutes it also appears that said board of directors gave much consideration to its contract with said Locker for the sale of shares of stock of said company, and that they refused to permit Mr. Locker to transact any business in reference to the sale of said shares of stock which could in any way prejudicially affect the interests of the corporation.

The evidence further shows that on the 5th day of March, 1910, the directors adopted a resolution to the effect that each of them be allowed compensation of $50.00 per month (52) and that between March 8, 1910 and May 15, 1911, said five directors received in cash upon said compensation, $1,700.00 (60).

It appears from the testimony of Mr. MacVichie that he made an examination of the property of the defendant corporation and that he estimated 7,783 tons of straight smelting ore in sight and figuring copper at twelve cents and silver at fifty-six cents per ounce would give a net value of $13.38 per ton (153) and that he also found 17,257 tons of concentrating ore of a net value of $75,240.00, making a total net value of $186,770.00 and that the cost of erecting proper concentrating mill and matting plant would be $55,000.00 leaving a profit on the present avail-

able ore of $131,770.00 (154). That the claims he examined were the Little Gem, four lodes, of 70 acres, Nevada Phoenix, three lodes, 52 acres, Two Widows group and Fraction, 22 acres; that the workings of the mines consisted of a shaft to the depth of 375 feet and six levels, certain up-raises and two stopes (152) and that all of the levels showed a well defined vein of merchantable sulphide ore; that at the time he examined the property he considered that twice the amount of ore in sight was capable of being obtained; that the prospective value of the Gem and Phoenix was very attractive, above the ordinary.

Mr. Alfred E. Raleigh testified that he supervised the opening up of the Gem claim; that there is a fissure vein on the claim and that it appears on the surface and can be traced for 500 feet and that he discovered the ore shoot in the vein which runs from 5 feet at the surface to 14 feet at the bottom and he followed the vein down on its entire depth with good walls. (162).

The evidence of Mr. E. O. Howard, the treasurer of the company, shows that the indebtedness at the time of the bringing of this action was approximately $8,297.75 (106).

A list of the stockholders of the defendant company (page 337), shows that John Janney was a large stockholder in the defendant corporation. Mr. Janney testified that he had all of the vouchers for receipts and disbursements of said company, some of which had not been writ-

ten up on the books of the company due to the fact that he had made a trip east. (50).

ASSIGNMENTS OF ERROR.

The defendant relies in this appeal upon the following assignments of error:

The interlocutory decree entered in this cause on the 14th day of February, 1914, is erroneous and against the rights of the defendant for the following reasons:

1. Because it appears from the record in this cause that the defendant corporation was not at the time said interlocutory order or decree was made and entered, insolvent.

2. Because it appears from the record in this cause that the interlocutory decree made and entered by the court in this cause on the 14th day of February, 1914, appointing a receiver, is the only decree which has been made in said cause, and that by said interlocutory decree said receiver is ordered to forthwith take possession of all of the real and personal property of said corporation and sell the same for cash at public sale, and to keep a complete and accurate record of all of his doings, including an inventory of all property received and held or sold, all moneys expended and debts incurred, and at the earliest practicable time report fully to said court the exact status and condition of the affairs of said corporation and

of his administration thereof, and that no decree has been made or entered by said court adjudicating the right of said complainant to have the defendant corporation dissolved or its affairs wound up.

3. Because it appears from the record in this cause that said action was tried upon its merits and submitted to the court for final adjudication, and the evidence shows that said corporation was not insolvent and that complainant was not entitled to have the decree made or entered dissolving said corporation and winding up its affairs.

4. Because it appears from the record in this cause that the complainant was not entitled to have the property of said defendant corporation sold under a receivership unless said corporation was dissolved or its affairs wound up, and the evidence in said cause showed that said plaintiff was not entitled to have a final or any decree entered dissolving said corporation or winding up its affairs.

5. Because the evidence in said cause showed that the said complainant was not entitled to have a decree of said court made or entered granting the prayer of his bill or any part thereof.

ARGUMENT.

The appellant in this cause will discuss the assignments of error in the order in which they are specified above.

1. The appellant contends that the decree made and entered in this cause is an interlocutory decree, and not a final one, because it does not finally dispose of all questions presented for decision in the cause; in fact it disposes of none of the issues in the case as framed by the pleadings, and it is uniformly held that a decree is only final when it disposes of all of the questions presented for decision in a cause and gives all of the relief which under the pleadings and proof the parties are entitled to.

Words & Phrases, Vol. 3, page 2774 to 2787.

The evidence in this case as set forth in the statement of fact in this brief shows that the assets of the defendant corporation consisted of numerous mining claims situated in Lander County, Nevada, and of more than 450,000 shares of treasury stock which was being sold in France for more than two dollars per share, and the sale of which the plaintiff is seeking to prevent in this action, and that in said mining claims there was then developed ore of a net value of $131,770.00, while the total indebtedness of the corporation aggregated approximately $8,-297.75. And no evidence was introduced by the plaintiff in this case (upon whom the burden rested of showing

insolvency of the corporation) that said corporation was not able to provide funds wherewith to pay its debts as they matured, and it must be apparent from the magnitude of the assets of said corporation and of their character that the presumption must be indulged in that said corporation was in a position to provide all funds necessary to pay its indebtedness as it matured. It must, therefore, be conclusively apparent that this corporation was not insolvent, for insolvency in its general sense is a term used to denote the insufficiency of the entire property and assets of an individual or corporation to pay its debts.

Vol. 4 Words & Phrases, citations page 3647.

And even though insolvency should be construed to mean inadequacy of the corporation's funds to pay its debts in the usual course of business, yet there is absolutely no showing in the evidence that said corporation was not able to pay its debts in the usual course of business.

2. In discussing assignment of error No. 2 we call the court's attention to the fact that the decree in said cause (65) appointed a receiver of all of the property of the defendant corporation with instructions to make a report to the court of the number of shares of stock of said corporation issued and outstanding on the 1st day of October, 1912, the number of shares in the treasury of said corporation on said date, whether or not stock has been issued and sold by the officers and agents of said

corporation since said date, and if so, to whom, and for what consideration; the money on hand on the first of October, 1912, the nature and amount of indebtedness of the corporation and to whom and when payable, and whether in money or stock of said corporation; whether or not any indebtedness has been incurred by the officers and agents of the company since the first of October, 1912, and if so the nature, amount and consideration of said indebtedness; TO SELL FOR CASH AT PUBLIC SALE ALL OF THE REAL AND PERSONAL PROPERTY OF SAID DEFENDANT CORPORTION. Then instructing the receiver in the manner in which said sale shall be made and then directing said receiver to keep a complete record of his doings and an inventory of all property received, held or sold, and of money expenses and debts incurred and to report fully to the court the exact status and conditions of the affairs of said corporation and of the administration thereof and directed the receiver to hold all cash received from any sources to be disbursed under the order of the court for the payment of expenses of the receivership, including such reasonable allowance as solicitor's fees for the bringing of this action as the court may deem proper and distribute the balance under the order of the court.

The court's attention is called to the fact that this decree does not adjudicate one single issue raised by the pleadings in the case, and nowhere in said decree is it

found or adjudicated that there is any emergency creating a condition of immediate necessity for the sale of said property or any of the same. Appellant contends that while an order for the sale of property in the hands of a receiver is one resting in the sound judicial discretion of the court, that the same is not arbitrary, but impartial to be exercised in obedience with the rules of law, and it is not proper to order a sale and distribution at a preliminary state of the suit when the cause has not been determined on its merits unless the evidence shows some emergency creating a condition of immediate necessity, and especially is this true where such sale depends upon the determination of an issue of fact raised by the pleadings which is properly the subject of final judgment in the case.

34 Cyc., page 310-311 and citations to said text.

We therefore contend that the decree ordering the receiver to sell all of the property of said defendant corporation was erroneous because the rights of the parties to the suit have not been finally determined and the court would have no right to sell the property of said corporation except it adjudicate that conditions existed which required the winding up of the corporation, and this has not been done, nor is there any finding or adjudication in the decree that the facts existed which would justify the court in winding up the affairs of the corporation, and we submit that if this interlocutory decree is permitted to

stand and the receiver by reason thereof makes a sale of all of the property and assets of the corporation before the final decree is entered when no showing is made of any emergency creating a condition of immediate necessity for such sale, that then upon the entering of a final decree adjudicating the rights of the parties upon the issues and pleadings as framed, if it should be adjudicated by the trial court that the corporation should be wound up and an appeal from such final decree were made and the appellate court should reverse the decree of the trial court and should hold that the evidence in the case did not justify the winding up of the corporation, then the corporation would of necessity be destroyed because its assets the character of which it needed in the conduct of its business had been disposed of and converted into cash.

3. We will discuss assignments of error Nos. 3, 4 and 5, together as the errors complained of are to a greater or less extent so interwoven as to make the discussion of all of the same together.

The plaintiff was only entitled to have a receiver appointed under the issues in his case if the defendant corporation was insolvent, or if the directors of said corporation had so fraudulently or otherwise mismanaged or threatened to fraudulently or otherwise mismanage the affairs of said corporation as to cause the stockholders thereof, including the plaintiff, to sustain injury or damage.

The only acts of mismanagement shown by the evidence in the case as above outlined in the statement of facts are, first, that the directors of said corporation had passed a resolution providing for the payment of $50.00 per month to each of them for services performed as such directors and by using the funds in the treasury of the corporation for the payment of a part of the monthly compensation provided for in said resolution, and second, that said board of directors had entered into a contract with P. B. Locker whereby Locker was permitted at his own expense to promote the sale of a large block of the treasury stock of the defendant corporation in France or elsewhere, and that the sale of said stock was to net the corporation 50 cents per share, and that Mr. Locker as reimbursement for expenses incurred by him and by way of commissions for services performed in the making of such sales was to receive all sums derived from such sales in excess of 50 cents per share; and the court's attention is called to the fact from the resolutions of the board of directors, that they considered that 50 cents per share was the reasonable net value of said stock to the corporation and nothing appears in the evidence from which it can be concluded that 50 cents a share was not a reasonable sum for said company to realize upon said stock.

The plaintiff in this case complains that the contract between the company and Locker was upon a basis that promised to yield to the company no returns. We submit that his proof did not sustain this allegation, and

that had this suit not been instituted, a large sum of money would have been deposited in the treasury from the sale of said stock. It is contended by the plaintiff that the corporation was dormant and was not transacting the business for which it was incorporated, but the evidence shows that at the time the defendant corporation acquired the mining claims now owned by it that there was a large quantity of very valuable ore blocked out therein by reason of extensive development theretofore performed and that said corporation placed in its treasury a large block of stock to be disposed of by the directors for the purpose of creating funds with which to construct reduction plants for the reduction of the ores already developed in said properties. The evidence also shows that the meetings of the directors were numerous and that all of them showed energy on the part of the board in its campaign to dispose of the treasury stock of the company at a reasonable price to the end that the reduction works required could be erected to treat the ores in the mine.

The contract with Mr. Locker was nothing more or less than an option granted to him by the company by which he had the right to purchase shares of stock from the company at 50 cents each and the corporation had no control over the campaign which Mr. Locker saw fit to pursue in the disposition of said stock so long as the same was honestly conducted, and surely the court would not be justified in appointing a receiver to wind up the

affairs of a corporation because some party holding an option upon the treasury stock granted by the board of directors was pursuing a campaign for the sale of the same which resulted in the acquiring by said optionholder of a sum far in excess for said stock upon the sale thereof of the price which was received by the corporation, if as a matter of fact the corporation received the reasonable net value of the stock. And again we submit that there is not shown by the evidence in this case one element of bad faith on the part of the directors in the contractual relations with Mr. Locker and if any complaint exists at all, it is merely one of difference of opinion between the plaintiff and the board of directors as to business policies connected with the transaction of the business of the corporation. We therefore submit that the evidence in this case shows conclusively that there was no fraudulent or other mismanagement of the affairs of the corporation and that the acts of the directors could not in any way operate to the injury or damage of the plaintiff or any other stockholder.

It has been held that a receiver should not be appointed for a corporate property when the specific acts are capable of redress and complete restitution by other means.

34 Cyc., page 80.

And we submit that under the authorities it is clear that a court should not wind up the affairs of a solvent corporation in any event unless it is apparent from the

testimony introduced that the corporation is being so mismanaged that it is useless to further permit it to conduct its business, because by so doing the assets of the corporation will be lost to the stockholders and creditors, or that the directors of the corporation are so conducting its affairs as to be destructive of its welfare and the majority of the stock of the corporation is so owned or dominated by the wrong-doing directors that it is apparent that no change of the management can be procured through a change in the board of directors.

It has been well said that each case for the appointment of a receiver and the winding up of its affairs must stand upon its own particular circumstances and conditions, and therefore we deem it unnecessary to indulge in an extended citation of authorities, but it is likewise well settled that a court will not undertake to wind up the affairs of a corporation and distribute its assets among its creditors and stockholders unless such action is absolutely essential to protect the creditors and stockholders in case of insolvency or in case of fraudulent or other gross mismanagement of the corporation which is or will produce material injury to said creditors and stockholders unless remedied, and where the said directors control or dominate the voting power of said corporation.

The court's attention is called to the fact that in the record a bill of complaint appears commencing on page 22. This bill, however, while it appears to have been filed

on October 16, 1911, as a matter of fact in Exhibit 2 attached to the original answer in the case at bar. The first suit was case No. 1164 and was dismissed prior to the bringing of the suit at bar.

In this connection the court's attention is called to the fact that this action is brought by Charles D. Bates individually as a stockholder of said corporation and not in behalf of himself and other stockholders, and that said plaintiff was the owner of only 200 shares of the capital stock of the defendant corporation (155); that he became the plaintiff in this suit by reason of being influenced so to do by one G. S. Kimball and by reason of representations by the said Kimball that if said suit was brought the said Kimball thought there would be a chance for the plaintiff to get the value of his stock out of it and that he (Kimball) would pay the expenses of the suit and the attorney's fees (156) and that so far as the list of stockholders is concerned it does not appear that the said Kimball was a stockholder of record in said corporation (238). That neither the directors whose acts are complained of nor any of the stockholders are represented in this suit, notwithstanding the fact that the interests and rights of every stockholder are involved in the subject matter thereof, and the court's attention is called to the further fact that said plaintiff made no attempt to have the directors cancel said contract nor did he make any attempt to seek a remedy within said corporation by calling upon

the stockholders as required under Rule 94 of the Rules in Equity; and we submit that said decree is erroneous in the particulars assigned.

The court's attention will undoubtedly be attracted by complaints made by said plaintiff in reference to the acts of a board of directors holding office prior to February 5, 1910, but we do not feel inclined to take up the time of the court in reviewing this testimony or the effect of the acts complained of, because they are not material or relevant to the issues in this case inasmuch as they are acts of a board of directors no longer in office and if any injury was sustained by reason of said acts the corporation had proper action against the several members of said board and in no event would plaintiff be entitled to any remedy by reason thereof other than the one of demanding of the directors that they bring proper action to preserve the interests and welfare of the corporation, and in the event of the failure of said board so to do, then the institution of a suit on behalf of himself and other stockholders representing the corporation to redress the wrongs complained of.

We submit that the decree of the trial court in this case should be reversed.

Respectfully submitted,

H. C. EDWARDS,
Counsel for Appellant.

No. 2441

United States
Circuit Court of Appeals
For the Ninth Circuit

Appellee's Brief

TENABO MINING AND SMELTING COMPANY, a Corporation,

Appellant,

vs.

CHARLES D. BATES,

Appellee.

Upon Appeal from the United States District Court for the District of Nevada.

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STATEMENT OF CASE FOR APPELLEE.

The appellant for its statement of the case has copied in full the entire pleadings, and has made but a brief statement of some phases of the facts as disclosed by the evidence. The case is somewhat unusual, in that it involves directly the stock-selling operations of the defendant corporation, and the connection of its chief managing officers and agents with those transactions. Indirectly it involves the Gem Consolidated Mining Company and the Tenabo Consolidated Mines Company, its predecessors in interest. Hiram Tyree was in control of the Gem Consolidated Mining Company, and Peyton B. Locker and John Janney, partners in the mining business, were in control of the Tenabo Consolidated Mines Company. In 1908 Tyree and Locker were both in New York vainly endeavoring to sell the stock of their respective companies. H. C. Edwards met them, and after suggesting that the property was not so far developed as to make the stock saleable, advised that they consolidate the two companies. The advice was followed, and the appellant is the result of the consolidation.

The appellant was organized for the purpose (according to the articles) of carrying on a general mining business—the organizers and first trustees being H. P. Clark, president of the Merchants' Bank; Lester D. Freed, merchant; R. T. Badger, cashier of the Utah National Bank; C. S. Varian and H. C. Edwards, all of Salt Lake City. (Tr. p. 121.) Of these directors Clark, Freed, Badger and Varian had no actual interest in the company whatever (Tr. pp. 209, 240), they having merely subscribed for the necessary amount of stock to enable them to be directors. Mr. Edwards, the only member of the com-

pany who had any interest in the property at that time, was engaged as an attorney in foreclosing a mortgage on a portion of the property which was turned in to the new company. Badger and Varian were picked out as directors by Mr. Tyree (Tr. pp. 248, 208), and Clark, Freed and Edwards by Locker and Janney. (Tr. pp. 240, 217.)

The authorized capital stock of the company was $3,000,000, divided into 1,500,000 shares of the par value of $2.00 each. The first business of the incorporators, after the election of officers, was to vote themselves each 2500 shares of the capital stock of the company for compensation for services and the right to purchase 5000 shares at 15 cents per share. (Tr. p. 295.) The next business was to purchase the property of the Gem Company for 450,000 and of the Tenabo Consolidated Mines Company for 300,000 shares, and then, after electing themselves as directors and authorizing themselves to provide for the sale of the treasury stock, the meeting of the incorporators adjourned.

Thereupon the directors held a meeting (Tr. p. 297) and voted to Messrs. Clark, Edwards and Badger as president, vice-president, and secretary and treasurer at a salary of $50 per month; also a salary to Mr. Varian as attorney of $50 for advice, expressly excluding all retainers or services in any litigation. Mr. Freed was not present at this meeting, and so he appears to have been omitted from the salary list, but he appears to have been present at the meeting of November 27, 1909, the first meeting after the company was in funds, and he was then placed upon the pay roll for $50 along with the rest. (Tr. p. 99.)

After passing the necessary resolution for the purchase of the properties of the two mining companies, as

theretofore agreed upon, a resolution was passed (by directors who could at that time have known very little of the company's affairs) granting to P. D. Locker an option to purchase 600,000 shares of the treasury stock at 15 cents per share for the first 400,000 shares and 20 cents per share for the remaining 200,000 shares. (Tr. pp. 303, 304.) Janney and Tyree shared equally with Locker in this contract. (Tr. p. 126.) Thereupon Locker began selling this stock in New York City at a price of 75 cents per share, using in his sales an application addressed by the purchaser directly to the appellant, and giving out a receipt in the name of the appellant for the purchase price at 75 cents per share. (Tr. pp. 220 et seq.) Although Mr. Badger, the treasurer of the company, was notified of this method of doing business (that is, a receipt in the company's name being executed for 75 cents per share, of which the company received but 15 cents per share), no protests ever seem to have come from the company. It seems, however (Tr. pp. 127, 128), to have finally occurred to Locker and Janney that this was a dangerous way of doing business (to have used the mails under this scheme would have made them liable to criminal prosecution under the postal laws), so after realizing $337.50 for the company and $1350 for themselves upon this proposition, they obtained a new contract from the company under which Locker and Janney were appointed the agents of the company to sell the stock of the company at not less than 50 cents per share. No commissions were to be paid, but Messrs. Locker and Janney were to be reimbursed for "such reasonable sums for expenses actually incurred by said parties in selling the said stock as the board may determine to be equitable and just." (Tr. pp. 131, 132.)

No stock was sold under this new arrangement (Tr. p. 133), and in the meantime it developed that the mining property which the company had started out with was not free of debt, in that there was a mortgage which Mr. Edwards, one of the directors of appellant, was foreclosing as attorney, and also a mechanic's lien. In order to clear up the matter of the mortgage, and incidentally have some money to pay the salaries of the officers, a block of 165,000 shares was sold for $25,000. (Tr. pp. 314, 315.) Neither Mr. Badger, the secretary and treasurer, nor Mr. Varian, the regularly retained attorney for the company at that time (Tr. p. 211), nor Mr. Janney (Tr. p. 86) could tell to whom this stock was sold, and Mr. Badger could not even tell the number of shares sold (Tr. p. 248), which showed how closely these officers attended to the business of the company. Of the $25,000 received for this stock, $448.60 went to the Windsor Trust Company of New York for services as fiscal agents; $18,860 went to clear up the mortgage which was being foreclosed; $1025.45 went to Mr. Edwards, the attorney for the plaintiff in the foreclosure and also a director in the appellant, and $2350 was immediately paid out to the other four directors as salary. (Tr. p. 141.)

No attempt was made to raise money except through the McCornick deal and the Locker contracts. (Tr. p. 216.) As Locker could not sell any more stock in this country at the excessive price asked, new fields had to be sought. France was sufficiently far away from the properties of the company to offer a good field for further operation, so Mr. Locker began to seek for a contract to sell the treasury stock to the French people. In the meantime Mr. Locker and Mr. Tyree had ceased amicable

relations with each other, and on account of the quarrel between these men the real intent and purpose of the incorporation began to dawn upon the directors, and, accordingly, all of them asked to be excused from any further participation in the scheme. As stated by Mr. Badger, "I closed my association because I did not want to do lots of things they wanted us to do—Locker and Tyree; also Janney, who seemed to side in with Locker." (Tr. p. 248.) As stated by Mr. Varian, "At the meeting had with reference to the French contract, I made it very clear to Mr. Janney just what I thought about it. I said we would not transact any more business for the corporation with Locker or Janney. He, Janney, said, 'Why don't you get out, then?' We said we would as soon as they could find another board to succeed us. I said we would not appoint any one connected with Tyree or Locker." (Tr. p. 213.) Accordingly, as stated above, all the directors resigned, and five new directors were named, one director resigning at a time, and the four remaining electing a new director in his stead. The new board as then organized consisted of W. Mont. Ferry, president; John Pingree, vice-president; E. O. Howard, treasurer and assistant secretary; John Janney, secretary, and Benner X. Smith, general attorney. Each member of this board qualified by showing 100 shares of the capital stock of the company. (Tr. pp. 325 et seq.)

Mr. Ferry was a director in Walker Brothers Bank and in the Utah Savings & Trust Company and held 100 shares of the appellant, having acquired them from Mr. John Janney for "about" $1.00. (Tr. p. 183.) He was asked by Mr. Howard to become a director. (Tr. p. 191.) He has never seen the property of the company, but

thinks Mr. Janney has seen it. (Tr. p. 184.) He testified: "It was never known that Mr. Janney was interested in the Locker contract." (Tr. p. 186.)

Mr. Howard was cashier of Walker Brothers Bank. He held 100 shares in the appellant, having acquired these shares from Mr. Janney for $1.00 when he was elected upon the board. (Tr. pp. 161, 166.)

John Pingree, cashier of the First National Bank of Ogden, held 100 shares in the appellant, for which he paid nothing. He was asked to go on the board by Mr. Janney. He did not know that Mr. Janney represented Mr. Locker. (Tr. p. 197.)

Mr. Smith, attorney at law of Salt Lake City, owned 100 shares which he received from Mr. Janney, for which he "possibly" paid $1.00. He was requested by Mr. Janney and Mr. Howard to become a director.

Upon the organization of the company, the directors voted themselves a salary of $50 a month each (Tr. p. 353), and authorized the making of Locker's French contract.

There appears to have been two meetings of the directors upon March 5, 1910. At the first meeting the president and the secretary were authorized to enter into a contract with Mr. Locker merely authorizing Mr. Locker to sell 450,000 shares of the treasury stock of the company for the price of not less than 50 cents per share, Mr. Locker to receive as his commission all in excess of the 50 cents and to pay all of the expenses of the sale, Mr. Locker, however, to be advanced the first $15,000 out of the sales to pay the expenses of the sale. (Tr. pp. 334 et seq.) At the next meeting of the company, held thirty minutes later (Tr. pp. 338 et seq.), a special power of

attorney was given to Mr. Locker authorizing him to enter into an agreement with some French bank, under which the appellant was to comply with the French laws regarding the sale of its treasury stock and was to give these bankers an option upon 450,000 shares of its capital stock at 6.25 francs per share. The procedure under which this stock was to be issued was as follows:

The 450,000 shares were to be deposited with a trustee (which was later named as the Windsor Trust Company). This trustee was to issue trust certificates (Tr. p. 409) showing that the bearer was entitled to 10 shares of stock and these certificates were to be deposited in a Parisian bank (which was later named as the Banque Franco-Americane). This Parisian bank was to deliver these certificates upon the payment of the agreed price. In this contract it was to be expressly agreed that the appellant was to be liable for none of the expenses of the admission to France or the flotation of the issue of stock, which were estimated to amount to $45,000.

At the same meeting a contract was authorized to be entered into with the Windsor Trust Company of New York to act as the trustee as required in the contract above set forth. (Tr. p. 406.) In spite of the fact that under the agreement with Mr. Locker the company was not to incur any of the expense of placing the stock in the French market, at the same meeting with the authorization of this contract, the board authorized the president and secretary to execute an undertaking whereby the company agreed to pay the various taxes and fees "which will be exacted in France for the duration of the life of this corporation." (Tr. p. 349.) (See also Article V of French contract, p. 370.)

Mr. Locker appears to have been unable to find any bank in France who would enter into this contract with him, so without any further authorization from the company he entered into an entirely different contract with one Bernard Desouches upon August 1, 1910, and upon October 29, 1910, the directors of the appellant approved this contract. This contract provided for the placing of the 450,000 shares of the treasury stock of the company at a price of 7 francs per share, this placing to be done through an underwriting syndicate to be formed by Bernard Desouches. The first 150,000 francs, however, received upon the sale of stock was to be turned over entirely to the managing committee of the underwriting syndicate. (Tr. pp. 365 et seq.)

On November 16, 1910, the company further authorized a commission of 2 francs per share to be paid to certain sub-agents out of the proceeds of the sale of the stock after the first 150,000 francs were paid out to the underwriting syndicate. (Tr. p. 381.)

From a letter from Mr. Locker dated July 13, 1911 (Tr. p. 458), it appears that he has collected some 96,250 francs from various persons who took an interest in this underwriting contract, but whether they ever actually made any sales of stock to purchasers is not known. It appears that certificates for about 66,000 shares were delivered by the French trustee, and the company has received from the French trustee the sum of $6511.83, this coming in three remittances of $2900.00 on November 17, 1911, $2887.18 on March 27, 1912, and $724.65 on July 15, 1912. (Tr. p. 147.) Whether this has been derived from the sale of stock, whether from the subscriptions of the underwriters, or from any other source, does not

appear to be known by any of the officers of the company.

Mr. Ferry, the president of the company, stated regarding the first remittance of $2900.00:

> "Yes, I know where the $2900.00 came from that was deposited with the company. It came from either Mr. Locker or the Franco-Americane Banque to the company. I think they were cables. We took the money for it and said 'Thank you.' I presume the company issued stock for it. I don't know. The books of the company here would not show whether it had surrendered anything for that $2900.00 or not." (Tr. p. 186.)

Mr. Howard, the treasurer of the company, stated:

> "On or about November 17, the company received a sum of money and deposited it in the Walker Brothers Bank. It was between $2900.00 and $3000.00 * * * and was received, I think, from Mr. Locker. It was for the use of the company—disbursements. I do not know anything else about it. * * * *I assumed it was proceeds from the sale of stock. The company entered into a contract with Mr. Locker to sell some of its treasury stock, and I presume this is the proceeds of the sale of some of that stock. * * * * They told me that was what it was. Mr. Janney did, I think. He did not say how much stock. I do not recall the exact details of the transaction. I think Mr. Janney must have wired him for the money." (Tr. pp. 164, 165.)

John Pingree, another trustee, knew "nothing of the transactions of the company, * * * nothing of the

receipt of any money." (Tr. p. 198.)

The only officers who appear to know anything about this were Mr. Janney and Mr. Smith. Mr. Smith said that "30,000 shares were ordered released for $3,000.00." The company "had to have funds to do the assessment work upon this property for 1911, and the matter was taken up by the board, and Mr. Janney was directed to advise Mr. Locker of the situation. We were advised that there were funds to be raised if we released this amount of stock." Mr. Smith did "not know to whom those French bearer certificates were sold," or "whether Locker got anything out of it or not. We were satisfied in order to raise this amount to let those certificates go." (Tr. p. 205.)

Nowhere does it appear just how much stock was released when the company obtained the remittance of March 27, 1912, or July 15, 1912. All that does appear is that 66,000 (or in another place 63,000) shares of stock have been turned over by the French trustee and the company has received from France $6511.83.

The financial transactions of this company so far as they were carried on by any one who was subject to subpœna from this court are shown in the bank statements on pages 141 to 145 of the transcript. From this it appears that since the organization of the company it has received the following sums:

From the sale of stock under the original Locker option at 75 cents per share..	$ 1,687.50
From the sale of 165,000 shares of stock to an unknown purchaser	25,000.00
From the sale of 2000 shares of stock at 50 cents per share to W. H. McCornick..	1,000.00

From loan from W. H. Shearman upon mortgage upon the property.....	1,500.00
From the French trustee.....	6,511.83
	$35,699.33

During the same time it has expended the following sums:

Commissions and expenses to Locker under the original option, checks 1, 2, 23.....$	1,900.00
Amount paid to McCornick & Company to clear up mortgage which was on the property at the time it was turned over to the company	18,860.00
Amount paid on account of principal and interest on the Shearman mortgage...	962.50
Amount paid for miscellaneous expenses (mostly incurred as a part of the sale of stock)	1,114.25
Amount paid Windsor Trust Co. and Union Trust Co. for fees in the matter of the sale of stock (checks 5 and 15 upon Walker Brothers Bank and amount deducted from $25,000.00 remittance)..	1,230.50
Assessment work on property.....	4,713.13
Taxes	261.97
Salaries and fees to directors.....	5,325.45
	$34,367.80

FINANCIAL CONDITION OF APPELLANT.

The affairs of the company are now and have been for considerable time in a most deplorable condition. No

books have been kept from which it can be ascertained what the true condition of the company is. (pp. 79, 76, 136.)

Mr. Janney says that the directors never voted to open books and that whenever they opened books in their office (Locker & Janney) for any of their corporations, they employed an expert bookkeeper. (p. 104.) He says, however, that he thinks he told his stenographer to make up a statement of everything whether they balanced or not just before she left the office (p. 104), but says "we have never made up a ledger account with any of these concerns." (p. 103.)

Mr. Janney acknowledges that he had the only records, but that he does not know the condition of the company and he thinks if he does not, no one else does. (p. 101.) He is very obscure in answering to various items that he was asked about. He assumed that if the statement of Mr. Varian was not correct that he would correct it. (p. 102.) He also says that he was in doubt as to what the company owes Mr. Locker, his partner, but states as a matter of opinion that it is something like $902.00, and that he could not think of anything else that it owed him. (p. 101.)

It is acknowledged by the treasurer that the indebtedness of the company is $8297.75 (pp. 92, 166), and that this indebtedness, except the Shearman mortgage for $1000.00 (p. 387) is subject to payment on demand. (p. 182.) It does not appear what makes up this indebtedness, but it seems that it is made up in part of $5300.00 directors' fees (p. 96), $500 attorney's fees (p. 95). $902.00 to Mr. Locker (p. 101), and $1000 on account of the Shearman note and mortgage (pp. 165, 387, 180).

Now this gives the only indebtedness that appears from the record. There seem to be other matters that are claims against the company. For instance, in 1909, Janney & Locker presented a bill for expenses aggregating $2082.85. This covered $1800 for office rent, office expenses and other items for the year ending December 31, 1909. (p. 98.) This bill was turned down by the old board, which at that time had become hostile to Locker & Janney. (p. 211.) But Janney wants to say that "I think there is a decided mistake in that," and that he felt "very much irritated" at the time. Locker & Janney have not given up their right to this claim and further claims along the same line, and who can tell but what this claim about which Mr. Janney feels there is some mistake may be presented to the new board, which is confessedly not antagonistic to Locker & Janney. Mr. Howard acknowledges the company maintains an office in charge of Mr. Janney. (p. 161.)

Again, there is a claim on the Gem mine, which conveyed its property to the Tenabo, in the nature of a lien called the "Seaman lien," "which the Tenabo Company may have to pay," Secretary Janney says, but of which he had no personal knowledge. (p. 92.)

Then again there is the claim of Mr. Adsit under the agreement (p. 223) entered into by the Gem Consolidated Mining Company through Hiram Tyree, president of the Tenabo Consolidated Mines Company, and through P. B. Locker, president, whereby Mr. Adsit was given the right to enter in and upon any and all property of the two companies and extract therefrom ores of sufficient value to fully discharge all indebtedness, which is shown by the agreement to be $5000.00. This agreement was recorded

in Lander County, Nevada, and was subsequently ratified by the board of directors for the Tenabo Consolidated Mines Company before they merged with the Gem Consolidated Mining Company and formed the Tenabo Mining & Smelting Company. (p. 94.) The record does not show whether the Gem Consolidated Mining Company also ratified this agreement before that time or not.

Mr. Janney stated that there was no other lien on the property and stayed with his statement until this was called to his attention by complainant's attorney. (p. 92.) Then he said "he had never heard of anything being done by this company which would tend to cast the burden of paying that debt on one company rather than the other." (p. 93.)

In view of all the facts it is a serious question whether there would be any escape for the Tenabo Mining & Smelting Company, the merging corporation, if Mr. Adsir seeks to enforce his claim against the property.

In order to prevent the further increase of the company's indebtedness it is necessary that there be nearly $450.00 paid into the treasury each month. The current *monthly* expenses are as follows:

Director's fee ..... $250.00 (p. 333)
Assessment work on 12 locations.. 100.00 (p. 103)
Incidental expenses, nearly..... 100.00 per month
(pp. 142, 143, 425, 426.)

This last amount is computed by taking the year 1910, which is evidently a representative year, as it does not show the expenses of incorporation and organization, and omitting the moneys paid for directors' fees and assessment work and two items amounting to $1550.00, which are assumed in this computation to be extraordinary.

The property of the Tenabo Mining & Smelting Company consists of the Gem mine, patented before the time of the merger, and the "Two Widows Claim," patented since the incorporation (pp. 100 and 141), and the remaining 12 claims which are locations only. (p. 80.) The Tenabo "has no other property, no office furniture, no safe or other office equipment." (p. 80.)

The value of the mining property is variously estimated by the different witnesses, the highest estimate being by Mr. MacVichie, an expert, testifying for the defendant, who says that with an expenditure of $55,000 (which said initial investment is computed in his report to the directors as shown by the minute book (p. 334) at $100,000), he estimates a profit could be made of $131,770.00. (p. 253.) On the other hand, Mr. Sizer, a mining engineer of long and valuable experience, states that he made as full an investigation as he could do of the workings, being hampered in his investigation by the refusal of Mr. Raleigh, the Tenabo's man, to allow him the use of the mining machinery. (pp. 158, 159.) He says he thinks the development of the mining district of the Tenabo is not sufficient to justify the establishment of a smelter or stamp mill (p. 157), and their own witness, Mr. MacVichie, says it is absolutely necessary to put in a stamp mill in order to make a success of the property.

The company has had no income whatever for more than two years last past (p. 15), except from the sale of treasury stock. (p. 166.)

There is no market for the treasury stock in America (pp. 246, 7 and 483), and the fact that a syndicate, specially formed for the purpose of floating the stock in France, makes a purchase of only 40,000 shares (p. 487),

from which the company received the gross amount of $5787 (p. 145), after having given away 21,429 shares (p. 89) for advertising purposes elsewhere more fully discussed in this brief, plainly indicates that there is no market for it in France and that such sales as are made are due to personal solicitation on the part of the syndicate and its members who were willing to make such misrepresentations as appeared in the company's prospectus. (p. 236.)

What the credit of the company was and is, is very forcibly shown by the fact that Mr. Janney, who was appointed on December 6, 1910, to negotiate a loan of $3000 and if necessary secure the payment of the same by a mortgage on the company's property (p. 385), on December 13, 1910, reported that he had been able to secure a loan for $1500 on this security, and we find the company agreeing to pay 10% interest and voting Mr. W. H. Shearman, the mortgagee, 1000 shares of treasury stock as a bonus, given in consideration of said loan. (p. 387.) We note also that Shearman was paid an attorney's fee of $26.00 a couple of months thereafter. (p. 144.)

It is submitted that it conclusively appears:

1st. That the company is indebted to the extent of $8297.75, and that the greater part of the indebtedness is now due.

2nd. That it has a contingent indebtedness of $5000 on the Adsit claim, of $3279 and court costs on the Seaman lien, and possible claims on the part of Locker & Janney for office rent and expenses.

3rd. That the indebtedness of the company is accumulating at the rate of $450 per month.

4th. That the company has no funds with which to pay its indebtedness due or to become due.

5th. That it has no income.

6th. That it has no credit worthy of the name.

7th. That its only possible way of raising money is by the sale of its treasury stock, for which there is no market or sale in America and no sale elsewhere which will enable the company to realize more than enough to pay its directors' fees and other current overhead expenses.

8th. That the value of the company's property is wholly speculative and that it is of no value unless there is first an expenditure of from $55,000 to $100,000 made on it.

Moreover, the fifth article of the French contract (Tr. 370) provides for the repayment to Locker of 150,000 francs, expended or to be expended in advertising the sale of appellant's stock in France. It is true that this obligation is not due until sufficient stock is sold to net the company that amount, but since the company is to receive but a fraction of the total amount paid for the stock, this article necessitates the sale of a large amount of the stock before the company receives any benefit whatsoever from the contract. In view of the fact that the company had at the time of the execution of the Locker or French contract, issued approximately two-thirds of its million and a half shares of stock, and of the limited speculative value of the prospect, it is inconceivable that Locker, even with the assistance of his numerous agents, would be able to sell more than enough stock to pay to him $30,000 for expenses. (Tr. 364.)

In the event, therefore, of no interference by a court,

and the continuation of his stock selling operations, the company would be in no better financial condition with an additional large block of its stock outstanding. Indeed, if it should permit the sale of stock cut up into numerous small certificates with dividend coupons attached, it would probably be liable to purchasers in an action for fraud. At all events, its assets would be in jeopardy and disaster would follow.

Locker in his numerous letters. (Tr. 646-472), claims that the appellant is indebted to him to the extent of 150,000 francs. Whether his contention is sound or not, in view of the complications resulting from this contract, that obligation should be considered to some extent as bearing upon the financial condition of the company. Its ability to pay debts is certainly impaired by such an obligation.

EQUITY OF THE CASE MADE BY APPELLEE.

In addition to the numerous facts pointed out in appellee's statement of the case, we invite the court's attention to the Locker letters (Tr. 427 et seq.), and particularly the following excerpts:

> "The plan that I have carried out has not necessitated by making any representations as to the exact amount that would go into the treasury. The parties interested in the contract receive a commission which fully protects me in the matter of receiving a commission myself, and I say to you frankly that my idea is to pay the expenses that have been incurred on behalf of Tenabo both by you and by myself, take for ourselves a reasonable profit, all of which we can itemize in a

full and complete statement, and continue to lend our support to the company, not only in our personal efforts, but in our liberality from a financial standpoint.'' (Tr. 465.)

Also:

''I have been called up twice today and asked when I was going to deliver the shares that have been underwritten and paid for. I make all kinds of 'stalls,' but have held them off just about the limit. One day they will come and demand their money or the shares, and I will be in a devil of a fix insomuch as I shall be unable to deliver either one or the other.'' (Tr. 466.)

Also:

''The representation to the purchaser that the shares are treasury stock is equally true whether I gave to the company shares of stock in an equal amount as a guarantee and protection to them or whether I do not give those shares and the company pays the expenses. And my suggestion that I give to the company 21,000 shares as a protection to them was only to convince the Board of Directors that I had confidence in the results to be derived from the expenditure made by me, rather than an exchange of nominative shares for bearer shares.'' (Tr. 470.)

The court will observe that the corporation has sold and authorized the sale of shares of stock at prices ranging from 15 cents to $1.40, although it appears that no development work, excepting only annual assessment work, has been done, either on the appellant's claims or surrounding claims, and although nothing appears in the

history of the company by way of discoveries on or around the claims that would justify any variations whatever in the prices asked for stock. The fluctuation has been due rather to the personal needs of the promoters, and to their willingness under varying conditions to take chances on their representations. Their success, of course, has been determined by the ignorance of their prospective purchasers. It was, no doubt, for that reason that they sought purchasers who had no means of gaining information respecting real conditions. We appreciate the fact that in the absence of collusion or fraud in the joint enterprise, the Locker letters would not have great weight. However, in this case the proof is controlling that the corporation is a mere tool of the promoters.

FORM OF DECREE.

Complaint is made that the decree appointing and directing the receiver is interlocutory and not final. It is true that the decree is short and follows the practice in eliminating all reference to pleadings, evidence and the opinion of the trial court. The court, however, has spoken clearly. It has taken possession of all of the assets of the corporation, through its receiver, and has directed the receiver to ascertain such facts as may be necessary to enable the court to make a just and equitable distribution. The court has at the same time directed that the real property be converted into money for distribution, pursuant to the statute. No final decree has or can be made determining the rights of all parties interested until the receiver reports pursuant to his directions. The court might have entered a similar decree upon a preliminary order to show cause, and if it had done so and if the

property had been converted, and the necessary other facts determined, the final decree might have been made at the close of the trial.

The court has taken every precaution to protect the interests of all parties concerned, and in view of the history of the appellant, it is in no sense in a position to complain of the promised protection to its stockholders and creditors. The suit was instituted by the appellee "in behalf of himself and other stockholders" similarly situated, and, although other stockholders have not in form joined in the proceeding, it is freely admitted that others have contributed toward the expenses of this litigation, in order to protect their interests.

AUTHORITIES.

Upon the whole case we submit the following authorities:

Hawes vs. Contra Costa Water Co., 14 Otto. 450; 104 U. S. 450, 26 L. Ed. 827.

In that case Mr. Justice Miller sets forth some conditions under which a shareholder can maintain a suit against a corporation. We think this case comes clearly within the rules laid down:

See also:

Clark & Marshall on Corporations, Vol. 2, Sec. 556.

1 Foster Fed. Prac., page 517.

Aiken et al. vs. Colo. River Irr. Co., 72 Fed. 591.

U. S. Ship Building Co. vs. Conklin, 126 Fed. 132-6.

Jones vs. Mutual Fidelity Co., 123 Fed. 506.

Carson vs. Alleghany Window Glass Co., 189 Fed. 791.

In the last cited case the court says:

"If it has become impossible for the corporation to answer any of the ends of its creation, and it has thus utterly failed in all its purposes, a court of equity would, under its general jurisdiction and powers and wholly aside from any statutory provision in that behalf, be authorized to wind up its business and affairs for the benefits of those really interested, namely: its creditors and stockholders, although not involving a dissolution or termination of the corporate franchise."

On questions of insolvency see:

Cunningham vs. Norton, 125 U. S. 77, 31 L. Ed. 624, where the court says:

"When a person is unable to pay his debts, he is understood to be insolvent.

It is difficult to give a more accurate definition."

Atwatter vs. Am. Exchange Nat. Bank, 152 Ill. 605, 38 N. E. 1017.

It is respectfully submitted that the decree should be affirmed.

CORWIN S. SHANK,
J. D. SKEEN,
Counsel for Appelee.

No. 2449

United States

Circuit Court of Appeals

For the Ninth Circuit.

GENERAL ELECTRIC COMPANY, a Corporation,
Appellant,

vs.

C. A. BROWER, as Trustee of the Estate of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, a Corporation, Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Names and Addresses of Attorneys.

FRANK H. KELLEY, Esquire, Tacoma Building, Tacoma, Washington;

RALPH WOODS, Esquire, Tacoma Building, Tacoma, Washington;

DOLPH, MALLORY, SIMON & GEARIN, Lawyers, Portland, Oregon;

Attorneys for Appellant.

WALTER M. HARVEY, Esquire, #1307 National Realty Building, Tacoma, Washington;

G. C. NOLTE, Esquire, Tacoma Building, Tacoma, Washington;

Attorneys for Appellee. [1*]

In the District Court of the United States for the Western District of Washington, Holding Terms at Tacoma.

No. ——

IN RE ANDRUS-CUSHING LIGHTING FIXTURE CO., a Corporation,

Bankrupt.

GENERAL ELECTRIC COMPANY, a Corporation,

Claimant and Appellant,

vs.

C. A. BROWER, Trustee of the Estate of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, a Corporation, Bankrupt,

Respondent and Appellee.

*Page-number appearing at foot of page of original certified Record.

Stipulation for Transcript.

IT HEREBY IS STIPULATED AND AGREED by and between counsel herein that the record on appeal in this matter shall constitute the following papers and none other, and that the Clerk, in preparing the record, shall omit all captions, endorsements, acceptances of service, verifications, etc., excepting file-marks:

1. Appellant's petition to reclaim.
2. Objections to confirmation of Trustee's sale.
3. Referee's order denying appellant's petition to reclaim, overruling appellant's objection to Trustee's sale and confirming sale.
4. Appellant's petition for review of Referee's order denying appellant's petition to reclaim, overruling appellant's objection to Trustee's sale and confirming sale.
5. Referee's certificate on review. **[2]**
6. Order Confirming Referee's decision.
7. Appellant's petition for appeal.
8. Bond on appeal.
9. Appellant's assignments of error.
10. Order allowing petition for appeal and approving bond.
11. Citation on Appeal.
12. Amended certificate under Rule 77.
13. This stipulation for record on appeal.

Dated at Tacoma this 14th day of July, 1914.

FRANK H. KELLEY,
RALPH WOODS,
Attorneys for Petitioner.
WALTER M. HARVEY,
Attorney for Trustee in Bankruptcy.

[Endorsed]: "Filed in the U. S. District Court, Western District of Washington, Southern Division. Jul. 14, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." **[3]**

Petition.

(That Lamp Stock be Withheld from Sale, etc.)

Comes now the Banner Electric Works of the General Electric Company, a corporation, by Ralph Woods, its attorney, and respectfully shows to the Court:

I.

That at the time of the filing of the petition in bankruptcy in the above-entitled proceedings, your petitioner was the owner of lamp stock of the value of six hundred and nineteen and 73/100 ($619.73) dollars, which said lamp stock is in the possession of the trustee in bankruptcy and which stock has at all times been kept separate and segregated from the stock of the said bankrupt.

II.

For a complete list of the stock of your petitioner, reference is hereby made to the first report of the Trustee, on page seven.

WHEREFORE, your petitioner prays that said

lamp stock be withheld from sale and upon a hearing the same be forthwith delivered to your petitioner.

BANNER ELECTRIC WORKS,
By RALPH WOODS,
Its Attorney.

[Endorsed]: "Filed this 8 day of October, 1913, at 10:00 A. M. R. F. Laffoon, Referee in Bankruptcy." **[4]**

Objection to the Confirmation of the Sale of the Banner Electric Stock.

Comes now the Banner Electric Works of the General Electric Company, by Ralph Woods, and Frank H. Kelley, its attorneys, and objects to the confirmation of the sale of what is known as the Banner Electric Stock, and shows to the Court as follows:

I.

That your petitioner has filed herewith claim for what is known as the Banner Electric Stock; that notice was given to purchaser at the time of the sale, that no action was taken by the Court at said time.

II.

That no appraisement was made of said goods and the property was sold without proper notice; that at the time of said sale the Referee states that the same would be sold subject to confirmation.

III.

Your petitioner further shows that said goods

belonging to your petitioner were held by the bankrupt merely as agent for your petitioner; that what is known as the Banner Electric stock was at all times segregated and kept separate from the main stock of the said bankrupt.

IV.

That your petitioner at all times while said stock was in the store of the said bankrupt was insured against fire and against burglars and said insurance was paid by your petitioner.

V.

That the taxes on the same were paid by your petitioner. **[5]**

VI.

That the first report of the Trustee shows that the stock of your petitioner was kept separate and segregated from the main stock, and your petitioner hereby refers to the first report of the Trustee for correct list of said stock.

VII.

That the following is a copy of the contract entered into by your petitioner and the said bankrupt, to wit:

"APPOINTMENT OF AGENT.
"INCANDESCENT LAMPS.

"The General Electric Company, a New York corporation, (hereinafter called the ('Manufacturer'), hereby through the General Manager of its Banner Electric Works, at Youngstown, Ohio, appoints Andrus-Cushing Lighting Fixture Company (hereinafter called the 'Agent'), *and* Agent to sell for its Banner incandescent lamps, manu-

factured under United States Letter Patent, of the types and classes hereinafter specified upon the terms and subject to the conditions herein set forth and said Agent hereby accepts the appointment, and agrees to comply with said terms and to perform all conditions hereof.

"1. The Agency hereby created shall continue for the period of one year from July 1, 1912, unless sooner terminated as herein provided.

"2. The manufacturer agrees to maintain in the custody of the Agent, to be disposed of as herein provided, a stock of its Banner Gem (metalized filament), Mazda (Tungston) and Tantalum patented incandescent lamps; all of the lamps in such consigned stock shall be and remain in the property of the Manufacturer until the lamps are sold, and the proceeds of all lamps **[6]** sold shall be held for the benefit and for the account of the Manufacturer until fully accounted for as hereinafter provided. The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the Manufacturer; but its intent is to maintain the stock on an average basis of from 30 to 60 days' supply, as estimated by the Agent. All lamps shipped hereunder by or on behalf of the Manufacturer either to the Agent or upon his request during the continuance of this Agency, shall be subject to the same terms, conditions and agreements as if shipped to said stock, whether or not so specified. The Agent shall return to the Manufacturer, at any time when directed by it, all or any part of the said lamps

that have not been sold, and any duly authorized representative of the Manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored.

"3. The agent is hereby authorized (a) to sell to anyone, lamps from said stock in broken package quantities at broken package prices, and in standard package quantities at standard package prices, and (b) to sell lamps from said stock to any purchaser under standard forms of contract made by the Manufacturer and under which the Agent may be given, by the Manufacturer written authority to deliver lamps at the prices fixed in said contracts, and (c) to sell, at prices on the same basis as those in standard forms of contract, lamps from said stock to any purchaser, not under contract, for the purchaser's immediate use; but sales under this subdivision (c) may be made only on written permission from the Manufacturer first obtained in each instance. All sales shall be made only at such prices and upon such terms as may be established by the Manufacturer; the present prices and terms being contained in the schedules [7] presented herewith, which are subject to change on written notice from the Manufacturer from time to time.

"Upon all bills and invoices for lamps sold by the Agent shall appear the words: 'Agent for Banner Incandescent Lamps of General Electric Company.' The Agent has no authority to sell or transfer or in any way dispose of such lamps, except as herein expressly provided, and shall not control, or attempt to control, the prices at which any purchaser

shall sell any of such lamps. The due payment to the Manufacturer for all sales made hereunder by the Agent shall be and hereby is Guaranteed by said Agent.

"The Agent shall conform to the educational and engineering instructions of the Manufacturer, and shall advise with and instruct prospective purchasers as to the classes and types of lamps best suited to their several requirements in order to secure a maximum illumination for a minimum expenditure and shall conduct the business hereunder to the satisfaction of the Manufacturer.

"4. All of the Agent's books and records relating to his transactions in connection with the sale and distribution of the Manufacturer's lamps shall at all times during business hours be open to the inspection of any duly authorized representative of the Manufacturer.

"5. The Agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expense incident thereto and to the accounting and collection of accounts thus created. The Agent shall be allowed as compensation for the performance of all obligations hereunder, the difference between the amount received from the sale of the lamps and their value on the basis of a discount of —— per cent [8] from list prices as at the time fixed by the Manufacturer. The Manufacturer agrees that if the Agent sells during the period of this appointment, a quantity of lamps the value of which would entitle him to a higher basis of compensation, as shown in schedules

presented herewith, the Manufacturer will at once credit the Agent with an amount equal to the difference between the compensation he has been receiving and the compensation he then becomes entitled to.

"6. The Agent shall render to the Manufacturer, not later than the tenth of every month, a report, on forms provided by the Manufacturer, covering his sales of the Manufacturer's lamps during the preceding calendar month.

"The Agent shall pay over to the Manufacturer, not later than the tenth of every month, an amount equal to the total sales of all lamps sold hereunder, less the compensation due the Agent for which collections have been made by the Agent during the preceding calendar month, and a further amount equal to the total sales value less the compensation due the Agent, on all lamps sold by the Agent to customers whose accounts covering such lamps are, on the first of the month, past due, according to the Manufacturer's standard terms of payment.

"If reports are forwarded as provided in this clause, and are accompanied by a remittance covering in full the lamps sold by the Agent during the preceding calendar month, whether or not such accounts have been collected, such remittance may be the total sales of the lamps sold, less the compensation due the Agent, and less 5 per cent of the amount arrived at, which 5 per cent shall be allowed as an additional compensation for such payment and service.

"7. The Agent shall, on or before the 15th day

of January and July, make and forward to the Manufacturer, on [9] forms provided by the Manufacturer, a complete itemized report or inventory of all of the Manufacturer's lamps on hand at the close of business on the last day of the preceding calendar month and shall render a similar report within 15 days after the termination or expiration of this appointment with reference to all such lamps on hand at the date of such expiration or termination. At the time for rendering each such report, the Agent shall pay to the Manufacturer the value of all lamps lost from the aforesaid stock or damaged, on the basis of list prices less a discount of 29 per cent.

"8. The Agency hereby created may be terminated by notice in writing to the Agent in the event that the Agent shall be or become insolvent or in the event of a breach by the Agent of any of the terms or conditions of this appointment. The expiration or termination of this Agency for any reason shall be without prejudice to the rights of the Manufacturer against the Agent, and immediately upon any such expiration or termination the Agent shall deliver to the Manufacturer all lamps consigned hereunder and that remain unsold and shall fully perform all obligations of the Agent that then remain unfulfilled.

"This appointment is hereby signed for the General Electric Company, the Manufacturer, by the General Manager of its Banner Electric Works or his duly authorized representative located in the

sales office of its said works at Youngstown, Ohio.

"L. N. NORRIS,

"General Manager Banner Electric Works.

"Accepted:

"ANDRUS-CUSHING LIGHTING FIXTURE COMPANY.

"Agent."

(Verification.)

Filed this 15 day of Oct., 1913, 10 A. M. R. F. Laffoon, Referee in Bankruptcy. **[10]**

Order (of Referee) Confirming Sale.

This cause coming on regularly to be heard on the 15th day of October, 1913, at the hour of 10 o'clock A. M. of said day, pursuant to the due and regular adjournment of the creditors' meeting held on the 11th day of October, 1913, upon the report of the trustee, of the sale of personal property of the bankrupt herein, and it appearing to the Court that due notice was given of the time and place of said sale as required by the laws of the United States and the order of this Court, and that said sale was conducted regularly in all respects, and that at said sale J. G. Parkhurst was the highest and best bidder for the personal property of said bankrupt and bid therefor the sum of $3,600 in cash, the said property including all the property of said bankrupt, except the book accounts and the personal property claimed by the Banner Electric Company as consigned goods, and

IT FURTHER APPEARING TO THE COURT, that the said J. G. Parkhurst bid for the

said property, claimed by the said Banner Electric Company as consigned goods, the sum of $210.00, and that said bid was the highest and best bid therefor, and

This cause coming on further to be heard on said 15th day of October, 1913, upon the petition of the said Banner Electric Company, praying that the said consigned goods be by order of this Court, turned over to the possession of said Banner Electric Company, as the property of said Banner Electric Company, the Court having heard the evidence presented in support of said petition and having heard the argument of counsel and being fully advised in the premises,

IT IS HEREBY ORDERED, that petition of the said Banner Electric Company aforesaid be and the same is hereby denied and [11] overruled, to which order the said Banner Electric Company by its counsel duly excepted and its exception is allowed.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED, that the sale of all the personal property of said bankrupt corporation with the exception of the book accounts and the consigned goods aforesaid to J. G. Parkhurst for the sum of $3,600.00 be and the same is hereby ratified, approved and confirmed and the trustee in bankruptcy herein, is hereby directed to forthwith deliver possession of said *personal to* the said John G. Parkhurst upon receiving from him the sum of $3,600.00 in cash.

IT IS FURTHER HEREBY ORDERED THAT THE SALE OF THE CONSIGNED GOODS claimed by the Banner Electric Company to J. G. Parkhurst for the sum of $210.00 be and the same is hereby ratified, approved and confirmed, but

the said trustee in bankruptcy is hereby directed to retain possession of said goods claimed by the said Banner Electric Company for the period of five days from and after the 15th day of October, 1913, which time is hereby allowed the said Banner Electric Company to file a petition for review before the district judge of said District.

Done in open court this 15th day of October, 1913.

R. F. LAFFOON,
Referee in Bankruptcy.

[Endorsed]: "Filed this 17 day of October, 1913, at 10:00 A. M. R. F. Laffoon, Referee in Bankruptcy." [12]

Petition for Review of Referee's Order.

To the Honorable R. F. LAFFOON, Referee in Bankruptcy:

Comes now the Banner Electric Works of the General Electric Company and respectfully shows:

I.

That heretofore prior to the sale of the stock belonging to the said bankrupt, your petitioner filed a petition with the Referee asking for the return and the possession of about six hundred nineteen and 73/100 ($619.73) dollars worth of lamp stock belonging to your petitioner, which said stock was held by the bankrupt as agent, a copy of the contract of agency which is marked Trustee's Exhibit No. 1.

II.

That thereafter said stock was sold by the trustee subject to the confirmation thereof for the sum of two hundred ten ($210.00) dollars.

III.

That your petitioner objected to the confirmation thereof and reference is hereby made to the said petition.

IV.

That said sale of the trustee was confirmed by the Referee on the 15th day of October, 1913.

V.

That the Referee in Bankruptcy erred in the following manner:

1. In permitting a sale of the stock without an appraisement.

2. In construing the contract of appointment of agent, Exhibit No. 1, as a conditional sale instead of a [13] bailment, and thereby confirming the sale and in ruling that such a contract, in order to protect the Manufacturer, must be recorded with the Auditor within ten days after such appointment.

3. In refusing an order allowing your petitioner the immediate possession of said Banner Electric stock.

WHEREFORE, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankruptcy Law of 1898 and General Order XXVII.

Dated this 15th day of October, 1913.

BANNER ELECTRIC WORKS OF THE BANNER ELECTRIC COMPANY,
Petitioner.
By RALPH WOODS,
Attorney for Petitioner.

"Filed this 15 of Oct., 1913, 2 P. M. R. F. Laffoon, Referee in Bankruptcy." [14]

Certificate of Referee on Petition for Review.

To the Honorable EDWARD E. CUSHMAN, U. S. District Judge.

I, R. F. Laffoon, the Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order a copy of which is annexed to the petition hereinafter referred to, was made and entered on the 17th day of October, A. D. 1913.

That, on the 15th day of October, 1913, the Banner Electric Works, a claimant in this cause, feeling aggrieved thereat, upon the ruling of the referee and in anticipation of the order, filed its petition for review of the aforesaid order herein, which was granted.

That a summary of the evidence on which such order was based is as follows: The claimant, the Banner Electric Works, by its petition claimed the return of certain lamp stock in the possession of the trustee of the value of $619.73, to which petition the trustee filed objections and exceptions, to wit:

I.

That the transaction between the Banner Electric Company and the bankrupt was a sale of the said stock to the bankrupt corporation.

II.

That the transaction between the Banner Electric Company and the bankrupt is not an absolute sale was a conditional sale and void as to creditors for the reason that the same was not recorded in the manner and form provided by the law of the State of Washington.

III.

That the title of the said goods under the law and the facts in this case is in the trustee in bankruptcy for the [15] benefit of all the creditors of the bankrupt.

IV.

That the Banner Electric Company has treated said transaction as a sale and has filed a general claim setting forth that it is a creditor to the extent of the purchase price of said goods, and that the said petitioner is now estopped from claiming that the title of the said property did not pass to the said trustee.

Upon the hearing of the petition on motion of counsel for the petitioner, the Banner Electric Company, was allowed to amend its proof of claim filed herein, in such manner as to exclude any of the lamp stock claimed in its petition, if its proof in fact included any of that stock, and so disposed of the trustee's fourth exception herein, and the hearing was had upon the trustee's exceptions 1, 2 and 3.

Upon the examination of Mr. Andrus, president of the bankrupt company, at page 6 of the transcript of the testimony it appears that the Banner Electric Company filed its proof of claim herein, claiming $1,399.00 in full of its account, and that at the same time its agent's monthly report for July 31, 1913, showed the bankrupt indebted to the Banner Electric Company in the sum of $961.29, not including in that sum the amount of stock on hand, which was something like $400.00 in value.

Upon the examination Mr. Ackroyd, secretary and treasurer of the bankrupt corporation, testified, at pages 18, 19, 20 and 21, that he was the agent of

petitioner, the Banner Electric Works, independent of his position as a stockholder in, and an officer of the bankrupt company; that as such agent he kept in storage here in Tacoma, lamp stock of the said Banner Electric Company and delivered from such warehouse stock to the bankrupt to be sold at retail; upon which he received a commission [16] of 5%; that his position as such general agent was well understood by both the bankrupt corporation and the petitioner herein. Mr. Ackroyd also testified on page 23, that the stock on hand was not included in the proof of claim as filed by the claimant herein, Mr. Ackroyd further testified on page 26 of the transcript of testimony, that he held the Banner Electric Company's goods in the warehouse controlled by them. In answer to the following question, "Did you deliver the goods they were short of, or a case of goods?" he answered, "Anything they needed." Of course a lot of these lamps were required on jobs and on retail sales. "Whenever they were needed you let them have them?" Answer, "Yes." "Just as they needed?" "Yes."

The trustee in his first report, filed September 22, 1913, attaches an inventory of the lamp stock on hand in the store September 8, 1913, claimed by the Banner Electric Company at the invoice price of the value of $619.73.

It is claimed that this lamp stock when in the store of the bankrupt for sale was kept separate and apart from the other goods in the house, and that separate accounts were kept of the sales of these goods as required in the contract between the Banner Electric Works and the bankrupt, which is in evidence as Trustee's Exhibit Number 1, but it does not appear

that there was any greater degree of separation as between the Banner Electric stock and other stock than would naturally be the case with any other special line of goods. The said contract purports to be one of agency and while it provides for the return of any unsold stock at any termination of the contract, whether it terminates by its own terms or from some act of the parties, yet it seems to me that its evident purpose was, to enable the Manufacturer to control the output of his mills and [17] the disposition of his products, and that when his goods are put in the hands of his so-called agents for sale that the sale is absolute so far as creditors are concerned, and that upon the termination of an agency as between the agent and the manufacturer, he could require the return of the unsold goods in accordance with his scheme of protecting and controlling his sales. The effect of this contract is to give the agent 60 days' credit, and ten days' further time in which to report sale of the goods actually disposed of, but there is nothing in the contract to prevent the said agent paying for all of the goods upon their receipt, but at the expiration of the 60 days plus 10 days the payment would constitute a sale of the goods and pass the title from the manufacturer. Section 8 of the said contract provides that the agency may be terminated by notice in writing to the company in event that the agent shall be, or become insolvent.

It appears from the testimony of Mr. Ackroyd, and from the claims for unpaid salary filed by Mr. Ackroyd and the president, that their wages of $30.00 per week was in arrears and had not been regularly paid them for quite a long period, and with other indebtedness against the bankrupt, which was

well known to Mr. Ackroyd, which knowledge was sufficient to apprise the Banner Electric Company of the inability of the Bankrupt to meet its obligations, but the petitioner took no steps to terminate the contract.

Section 2 of the contract shows that it was the intention of the parties that the agent should have and maintain a 30 to 60 days' supply of stock as estimated by the agent, and under section 6 of the contract it was contemplated that the agent should settle every 30 days, upon the 10th of the month, and [18] pay for all lamps that had been sold and collected for, and also to pay for the lamps that had been sold and had not been paid for for more than a month, which to my mind shows that it was expected in the making of said contract to the agency that the stock furnished the agent would be paid for by the agent within 60 days plus ten days. This contract expires by its terms on the 8th day of July, 1913, and the adjudication in bankruptcy was had on the 14th day of August, 1913, no change having been made in the conduct of the business within that period.

It is my opinion that all of the lamp stock put into the store by the agent, Mr. Ackroyd, from the Banner Electric Company's warehouse was sold to the bankrupt, and there was no expectation or intention on the part of the said agent that any of it would be taken back by the Banner Electric Company. I think this case is similar to the case, In re Graves & Labelle, number 5030, decided by the Honorable Edward E. Cushman about June 27, 1913, and therefore sustained the exceptions filed by the trustee, and denied the application of the Banner Electric Company.

That the question presented on this review is: Whether or not the petitioner, the Banner Electric Company, is entitled to the possession of a certain stock of lamps now in the possession of the trustee in bankruptcy herein.

I hand up herewith for the information of the judge the following papers:

1. Petition for Review.
2. Order denying the application and confirming sale.
3. Petition for the delivery of the goods.
4. Objections to the confirmation of the sale.
5. Objections and exceptions of the trustee. [19]
6. Trustee's first report.
7. Minutes of the meeting of October 11, 1913.
8. Transcript of the testimony taken September 10, 1913.
9. Transcript of the testimony taken October 15, 1913.
10. Trustee's Exhibit number 1.
11. Petitioner's Exhibit "A."
12. Petitioner's Exhibit "B."

Dated October 18, 1913.

Respectfully submitted,

R. F. LAFFOON,

Referee in Bankruptcy.

[Endorsed]: Filed this 8th day of Oct., 1913, 11:30 A. M. R. F. Laffoon, Referee in Bankruptcy."

"Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 18, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [20]

Order Confirming Referee's Decision.

This matter coming on on review of the Referee's decision, it is now ordered that the Referee's decision be, and the same is hereby affirmed.

(January 12, 1914.) [21]

Petition for Appeal.

Now comes General Electric Company, a corporation, petitioner for the reclamation of certain goods in the hands of the Trustee, as by the records and files of this court more fully appear, and considering itself aggrieved by the order and final decree of this Court made and entered January 12, 1914, confirming the order of the Referee denying said petition made and entered on October 15, 1913, hereby does appeal from said order and final decree, and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in its Assignments of Error which is filed herewith.

Your petitioner presents herewith its said Assignments of Error and its Bond on Appeal in the penal sum of two hundred fifty ($250.00) dollars with the Fidelity and Deposit Company of Maryland, a corporation authorized to act as surety within this District, and prays that said sum be fixed as the amount of its said bond on appeal, and that its said bond as executed be approved, and further prays that this, its said appeal, may be allowed and that transcript of the record, proceedings and papers upon which said order and final decree were made, duly authenticated, may be sent to the United States Circuit

Court of Appeals for the Ninth Circuit, and that citation may issue to C. A. Brower, the Trustee in Bankruptcy of the estate of the said Bankrupt, to be and appear in said Circuit Court of Appeals on a day certain, as by law provided.

FRANK H. KELLEY,
RALPH WOODS,

Attorneys for General Electric Company, Petitioner as aforesaid. Suite 717–18–19, Tacoma Bldg., Tacoma, Wash. [22]

DOLPH, MALLORY, SIMON & GEARIN,
Of Counsel.

Service of the within and foregoing petition, by the receipt of copy thereof, hereby is acknowledged this 4th day of May, 1914.

WALTER M. HARVEY,

Attorneys for C. A. Brower, Trustee in Bankruptcy of the Estate of Andrus-Cushing Lighting Fixture Co., a Corporation, Bankrupt.

"Filed in the U. S. District Court, Western District of Washington, Southern Division. May 6, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [23]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, General Electric Company of New York, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto C. A. Brower, as Trustee in Bankruptcy of the estate of Andrus-Cushing Lighting Fixture Company, a corporation, bankrupt, in the penal sum of two hundred fifty ($250.00) dollars, well and truly to be

paid to the said C. A. Brower, Trustee, or to his successors in said trust, for the payment of which well and truly to be made we hereby bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed and dated at Tacoma this 4th day of May, 1914.

The condition of this obligation is such that

WHEREAS, the above-bounden General Electric Company has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order and final decree of the said District Court of the United States for the Western District of Washington, denying the said General Electric Company's petition for the reclamation of certain goods, which final order and decree was made and entered as of record as of January 12, 1914, in the records and files of said court.

NOW, THEREFORE, if the said General Electric Company shall prosecute its said appeal to effect and answer all costs and damages that may be awarded against it on said appeal, if it fail to make its said appeal good, then this obligation is to be void, otherwise to be and remain in full force and virtue. [24]

IN WITNESS WHEREOF, the above-bounden principal has caused its name to be hereto affixed, by Frank H. Kelley, Esq., its attorney, so to do duly authorized, and the above-bounden surety has caused its name and corporate seal hereto to be affixed by H. T. Hansen, its attorney in fact, so to do duly au-

thorized, at Tacoma the day and year above written.

GENERAL ELECTRIC COMPANY OF NEW YORK, a Corporation.

By FRANK H. KELLEY,
Its Attorney.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

By H. T. HANSEN, (Seal)
Its Attorney in Fact.

Approved:

EDWARD E. CUSHMAN,
Dist. Judge.

"Filed in the U. S. District Court, Western District of Washington. Southern Division. May 6, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [25]

Assignments of Error.

Now comes General Electric Company of New York, a corporation, petitioner for the reclamation of certain goods in the hands of the Trustee of the above-entitled bankrupt estate, and petitioner on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and final decree of the above-entitled District Court denying its said petition for reclamation, and herewith makes upon its said petition the following Assignments of Error, to wit:

I.

The said District Court erred in finding under the evidence and the stipulated facts that the title of said goods sought to be reclaimed was in the Trustee of

said bankrupt estate and not in the petitioner for reclamation.

II.

The said District Court erred in finding under the evidence and the stipulated facts that the transaction therein set forth between said bankrupt corporation and said petitioner for reclamation constituted a sale of the said goods by the petitioner to the said bankrupt.

III.

That said District Court erred in ~~not~~ finding under the evidence and the stipulated facts that the transactions therein set forth between the petitioner and the said bankrupt corporation constituted if not an actual, a conditional sale of said goods by the said petitioner for reclamation with the said bankrupt, and as such conditional sale said transaction was required by the laws of the State of Washington to be recorded as of a [26] public record to be effective as against creditors of the said bankrupt corporation or their representative.

IV.

The said District Court erred in failing to find from the evidence and the stipulated facts that the transactions between the said petitioner for reclamation and the said bankrupt corporation constituted an agency for the sale of said goods, and the property of said petitioner for reclamation by the said bankrupt corporation as an agent, and that the title of said goods remaining unsold was in the petitioner for reclamation.

V.

The said District Court erred in failing to find under the evidence and the stipulated facts that the

title to said goods was in the petitioner for reclamation and that the said petitioner for reclamation had a present right to said goods.

VI.

The said District Court erred under the evidence and the stipulated facts in denying the petition for reclamation of the petition, and in affirming the order theretofore made of the Referee in Bankruptcy denying said Petition.

WHEREFORE, the said petitioner for reclamation prays that said order and final decree of the said District Court be reversed and that the said District Court may, by mandate, be directed to enter a final order and decree allowing the petition of the said petitioner for reclamation. [27]

FRANK H. KELLEY,
RALPH WOODS,

Attorneys for General Electric Company, Suite 717–18–19, Tacoma Bldg., Tacoma, Washington.

DOLPH, MALLORY, SIMON & GEARIN,
Of Counsel.

Service of the within and foregoing Assignments of Error, by the receipt of a copy thereof, hereby is acknowledged this 4th day of May, 1914.

WALTER M. HARVEY,

Attorneys for A. C. Brower, Trustee in Bankruptcy of the Estate of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt.

"Filed in the U. S. District Court, Western District of Washington, Southern Division. May 6, 1914. Frank L. Crosby, Clerk. By F. M Harshberger, Deputy." [28]

Order Granting Appeal and Fixing the Amount of Bond on Appeal.

The petitioner, General Electric Company, having heretofore filed its petition for appeal and therewith assignments of error together with its bond in the penal sum of two hundred fifty ($250.00) dollars, conditioned as by law required, and with Fidelity and Deposit Company of Maryland as surety; having further given due notice to the Trustee of the above-named bankrupt of its said petition and its said bond and of the time of presenting same,

IT IS ORDERED that the said appeal be and the same hereby is allowed to the said petitioner, and the amount of its bond on appeal hereby is fixed as of the sum of two hundred fifty ($250.00) dollars, and the petitioner's said bond on appeal in said penal sum, with the surety aforesaid, hereby is approved; and

IT FURTHER IS ORDERED that citation issue to the said C. A. Brower, as Trustee of the said Bankrupt estate, as by law provided.

Done in open court at Seattle this 5th day of May, 1914.

Exception allowed respondent.

EDWARD E. CUSHMAN,
Judge of the District Court of the United States for the Western District of Washington, Holding Terms at Tacoma.

"Filed in the U. S. District Court, Western District of Washington, May 6, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [29]

In the District Court of the United States for the Western District of Washington, Holding Terms at Tacoma.

No. ——

IN RE ANDRUS-CUSHING LIGHTING FIXTURE CO., a Corporation,

Bankrupt.

GENERAL ELECTRIC COMPANY, a Corporation,

Claimant and Appellant,

vs.

C. A. BROWER, Trustee of the Estate of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, a Corporation, Bankrupt,

Respondent and Appellee.

Amended Stipulation for Record Under Rule 77.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled suit, that the following Amended Statement of the Case shall supersede for the purposes of the appeal all parts of the record and shall be considered by the Appellate Court in lieu of record on appeal, as provided by Rule 75 of the Rules of Practice of Courts of Equity of the United States, and shall be and constitute the Statement on Appeal as provided by Rule 77 of said Rules and Practices:

I.

That on the 8th day of July, 1912, the General Electric Company and the Andrus-Cushing Lighting Fixture Company entered into a contract known as "Form A," in words and figures as follows, to wit:

"APPOINTMENT OF AGENT.
"INCANDESCENT LAMPS.

"The General Electric Company, a New York corporation (hereinafter called the 'Manufacturer'), hereby, through the General Manager of its Banner Electric Works, at Youngstown, Ohio, appoints Andrus-Cushing Ltg. Fixt. Co. of Tacoma, Wash., (hereinafter called the 'Agent'), an Agent to sell for it its Banner Incandescent Lamps manufactured under United States Letters Patent, of the types and classes hereinafter specified, upon the terms and subject to the conditions herein set forth, and said Agent hereby accepts the appointment, and agrees to comply with said terms and to perform all conditions hereof.

1. The Agency hereby created shall continue for the period of one year from July 8th, 1912, unless sooner terminated as herein provided. [30]

2. The Manufacturer agrees to maintain in the custody of the Agent, to be disposed of as herein provided, a stock of its Banner Gem (metalized filament), Mazda (Tungston) and Tantalum patented incandescent lamps; all of the lamps in such consigned stock shall be and remain the property of the Manufacturer until the lamps are sold, and the proceeds of all lamps sold shall be held for the benefit and for the account of the Manufacturer until fully accounted for as hereinafter provided. The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the Manufacturer; but its intent is to maintain the stock on an average basis of from 30 to 60 days' supply, as estimated by the Agent. All lamps shipped hereunder by or on behalf of the Manufacturer either to the Agent or upon his request during the continu-

ance of this Agency, shall be subject to the same terms, conditions and agreements as if shipped to said stock, whether or not so specified. The Agent shall return to the Manufacturer, at any time when directed by it, all or any part of the said lamps that have not been sold, and any duly authorized representative of the Manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored.

3. The agent is hereby authorized (a) to sell to anyone, lamps from said stock in broken package quantities at broken package prices, and in standard package quantities at standard package prices, and (b) to sell lamps from said stock to any purchaser under standard forms of contract made by the Manufacturer and under which the Agent may be given, by the Manufacturer, written authority to deliver lamps at the prices fixed in said contracts, and (c) to sell, at prices on the same basis as those in standard forms of contract, lamps from said stock to any purchaser, not under contract, for the purchaser's immediate use; but sales under this subdivision (c) may be made only on written permission from the Manufacturer first obtained in each instance. All sales shall be made only at such prices and upon such terms as may be established by the Manufacturer; the present prices and terms being contained in the schedules presented herewith, which are subject to change on written notice from the Manufacturer from time to time.

Upon all bills and invoices for lamps sold by the Agent shall appear the words: 'Agent for Banner Incandescent Lamps of General Electric Company.' The Agent has no authority to sell or transfer or in any way dispose of such lamps, except as herein ex-

pressly provided, and shall not control, or attempt to control, the prices at which any purchaser shall sell any of such lamps. The due payment to the Manufacturer for all sales made hereunder by the Agent shall be and hereby is guaranteed by said Agent.

The Agent shall conform to the educational and engineering instructions of the Manufacturer, and shall advise with and instruct prospective purchasers as to the classes and types of lamps best suited to their several requirements in order to secure a maximum illumination for a minimum expenditure, and shall conduct the business hereunder to the satisfaction of the Manufacturer.

4. All of the Agent's books and records relating to his transactions in connection with the sale and distribution of the Manufacturer's lamps shall at all times during business hours be open to the inspection of any duly authorized representative of the Manufacturer.

5. The Agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expense incident thereto and to the accounting and collection [31] of accounts thus created. The Agent shall be allowed as compensation for the performance of all obligations hereunder, the difference between the amounts received from the sale of the lamps and their value on the basis of a discount of 29 per cent from list prices as to the time fixed by the Manufacturer. The Manufacturer agrees that if the Agent sells, during the period of this appointment, a quantity of lamps the value of which would entitle him to a higher basis of compensation, as shown in Schedules pre-

sented herewith, the Manufacturer will at once credit the Agent with an amount equal to the difference between the compensation he has been receiving and the compensation he then becomes entitled to.

6. The Agent shall render to the Manufacturer, not later than the tenth of every month, a report, on forms provided by the Manufacturer, covering his sales of the Manufacturer's lamps during the preceding calendar month.

The Agent shall pay over to the Manufacturer, not later than the tenth of every month, an amount equal to the total sales value of all lamps sold hereunder, less the compensation due the Agent, for which collections have been made by the Agent during the preceding calendar month, and a further amount equal to the total sales value less the compensation due the Agent, on all lamps sold by the Agent to customers whose accounts covering such lamps are, on the first of the month, past due, according to the Manufacturer's standard terms of payment.

If reports are forwarded as provided in this clause, and are accompanied by a remittance covering in full the lamps sold by the Agent during the preceding calendar month, whether or not such accounts have been collected, such remittance may be the total sales value of the lamps sold, less the compensation due the Agent, and less 5 per cent of the amount so arrived at, which 5 per cent shall be allowed as an additional compensation for such payment and service.

7. The Agent shall, on or before the 15th day of January and July, make and forward to the Manufacturer, on forms provided by the Manufacturer, a complete itemized report or inventory of all of the

Manufacturers' lamps on hand at the close of business on the last day of the preceding calendar month, and shall render a similar report within 15 days after the termination or expiration of this appointment with reference to all such lamps on hand at the date of such expiration or termination. At the time for rendering each such report, the Agent shall pay to the Manufacturer the value of all lamps lost from the aforesaid stock or damaged, on the basis of list prices, less a discount of 29 per cent.

8. The Agency hereby created may be terminated by notice in writing to the Agent in the event that the Agent shall be or become insolvent or in the event of a breach by the Agent of any of the terms or conditions of this appointment. The expiration or termination of this Agency for any reason shall be without prejudice to the rights of the Manufacturer against the Agent, and immediately upon any such expiration or termination the Agent shall deliver to the Manufacturer all lamps consigned hereunder and that remain unsold and shall fully perform all obligations of the Agent that then remain unfulfilled.

This appointment is hereby signed for the General Electric Company, the Manufacturer, by the General Manager of its Banner Electric Works or his duly authorized representative located in the sales office of its said works at Youngstown, [32] Ohio.

(Signed) N. L. NORRIS,
General Manager Banner Electric Works.

Accepted:

(Signed) ANDRUS-CUSHING LTG. FIXTURE CO.

F. L. CUSHING, Tr.,
Agent."

That in pursuance of said contract and in accordance with its terms, the lamps in controversy in this proceeding were delivered by the General Electric Company through its Banner Electric Works to the Andrus-Cushing Lighting Fixture Company and that the value of said lamps is $600.00.

II.

That the said contract was not recorded in the Auditor's office of Pierce County, Washington.

III.

That the said lamps were not kept separate and apart from other stock of the bankrupt company, except that they were kept together on shelves in one place for sale, and in boxes marked "Banner Electric Company."

IV.

The bankrupt company paid all expenses in storage taxes, insurance, cartage, transportation, handling and sale of all lamps delivered to it in accordance with the contract above set out:

V.

Prior to the execution of the contract aforesaid, one Ackroyd was a general agent of the Banner Electric Works of the General Electric Company in Tacoma and vicinity. After the execution of said contract, the said Ackroyd became a stockholder and officer of bankrupt corporation, with the knowledge and consent of the Banner Electric Works of the General Electric [33] Company, but on the condition that the bankrupt company should have no interest in Ackroyd's agency or the emoluments thereof, which condition was observed by all the parties. During the existence of the said contract between the Banner Electric Works of the General

Electric Company and the bankrupt, Ackroyd was the Secretary and Treasurer of and a stockholder in said bankrupt corporation, and was at the same time the agent and representative in Tacoma of the Banner Electric Works of the General Electric Company; this double relation was known to and acquiesced in by both the Banner Electric Works of the General Electric Company and the bankrupt corporation.

As Agent of the Banner Electric Works of the General Electric Company, Ackroyd had a depot or warehouse in which were stored and kept in the City of Tacoma the lamps of the Banner Electric Works of the General Electric Company, and from this depot or warehouse he supplied the lamps of the General Electric Company to purchasers and agents, and upon request they were supplied to the Andrus-Cushing Lighting Fixture Company, the bankrupt corporation. When he delivered from such warehouse a stock of lamps to the bankrupt corporation, which they sold at retail, he received a commission of five per cent. Any goods which the bankrupt corporation were short of at any time were supplied by Ackroyd as agent of the Banner Electric Works of the General Electric Company from this warehouse and he furnished to the bankrupt corporation anything which they needed on their various jobs or on retail sales.

Ackroyd, while acting as such agent for the Banner Electric Works of the General Electric Company, knew by reason of his position as Secretary and Treasurer and a stockholder in the bankrupt corporation, that the wages and salary of $30.00 [34] per week of Mr. Andrus as President and of

himself as Secretary and Treasurer were in arrears and had not been regularly paid them for quite a long period, and also of other unpaid indebtedness of the bankrupt corporation which it had not and could not pay in the regular course of business, and the said bankrupt corporation was unable to meet its various obligations and was insolvent, and although the said Banner Electric Works of the General Electric Company, through its said Agent, Ackroyd, knew of these facts, it took no steps or proceedings to terminate the contract between the General Electric Company and the bankrupt corporation.

The contract in controversy expired by its terms on the 8th of July, 1913, and the petition in bankruptcy and the adjudication in bankruptcy were both filed and entered on the 14th day of August, 1913, and no change had been made in the manner of conducting the business of the bankrupt corporation or in the relations between the Banner Electric Works of the General Electric Company and the bankrupt during that period.

Thereafter, on October 8th, 1913, a petition to reclaim said goods was duly filed, as follows:

"Comes now the Banner Electric Works of the General Electric Company, a corporation, by Ralph Woods, its attorney, and respectfully shows to the Court.

I.

That at the time of the filing of the petition in bankruptcy in the above-entitled proceedings, your petitioner was the owner of lamp stock of the value of six hundred and nineteen and 73/100 ($619.73) dollars, which said lamp stock is in the possession of

the trustee in bankruptcy and which stock has at all times been kept separate and segregated from the stock of the said bankrupt.

II.

For a complete list of the stock of your petitioner reference is hereby made to the first report of the trustee, on page seven.

WHEREFORE, your petitioner prays that said lamp stock be withheld from sale and upon a hearing the same be forthwith delivered to your petitioner.

BANNER ELECTRIC WORKS,
By RALPH WOODS,
Its Attorney. [35]

[Endorsed]: Filed this 8 day of October, 1913, at 10:00 A. M. R. F. Laffoon, Referee in Bankruptcy."

And objections to the confirmation of a sale of said goods by the trustee were filed on October 15, 1913, as follows:

"Comes now the Banner Electric Works of the General Electric Company, by Ralph Woods and Frank H. Kelley, its attorneys, and objects to the confirmation of the sale of what is known as the Banner Electric stock, and shows to the Court as follows:

I.

That your petitioner has filed herewith claim for what is known as the Banner Electric stock; that notice was given to purchaser at the time of the sale; that no action was taken by the Court at said time.

II.

That no appraisement was made of said goods and the property was sold without proper notice; that at the time of said sale the referee states that the same

would be sold subject to confirmation.

III.

Your petitioner further shows that said goods belonging to your petitioner were held by the bankrupt merely as agent for your petitioner; that what is known as the Banner Electric stock was at all times segregated and kept separate from the main stock of the said bankrupt.

IV.

That your petitioner at all times while said stock was in the store of the said bankrupt was insured against fire and against burglars and said insurance was paid by your petitioner.

V.

That the taxes on the same were paid by your petitioner.

VI.

That the first report of the trustee shows that the stock of your petitioner was kept separate and segregated from the main stock, and your petitioner hereby refers to the first report of the trustee for correct list of said stock.

VII.

That the following is a copy of the contract entered into by your petitioner and the said bankrupt, to wit:

(Herein follows the contract as hereinbefore set forth.)"

Thereafter Appellant's petition to reclaim was denied and its objections to the Trustee's sale were overruled, as follows:

"This cause coming on regularly to be heard on the 15th day of October, 1913, at the hour of 10 o'clock

A. M. of said day pursuant to the due and regular adjournment of the creditor's meeting held on the 11th day of October, 1913, upon the report of the trustee, of the sale of personal property of the bankrupt herein, and it appearing to the Court that due notice was given of the time and place of said sale as required by the laws of the United States and the order of this Court, and that said sale was conducted regularly in all respects, and [36] that at said sale J. G. Parkhurst was the highest and best bidder for the personal property of said bankrupt and bid therefor the sum of $3,600 in cash, the said property including all of the property of said bankrupt, except the book accounts and the personal property claimed by the Banner Electric Company as consigned goods, and

It further appearing to the Court, that the said J. G. Parkhurst bid for the said property claimed by the Banner Electric Company as consigned goods, the sum of $210.00, and that said bid was the highest and best bid therefor, and

This cause coming on further to be heard on said 15th day of October, 1913, upon the petition of the said Banner Electric Company, praying that the said consigned goods be by order of this Court, turned over to the possession of said Banner Electric Company as the property of said Banner Electric Company, the Court having heard the evidence presented in support of said petition and having heard the argument of counsel and being fully advised in the premises,

IT IS HEREBY ORDERED, that said petition

of the said Banner Electric Company aforesaid be and the same is hereby denied and overruled, to which order the said Banner Electric Company by its counsel duly excepted and its exception is allowed.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED, that the sale of all the personal property of said bankrupt corporation with the exception of the book accounts and the consigned goods aforesaid to J. G. Parkhurst for the sum of $3,600.00 be and the same is hereby ratified, approved and confirmed and the trustee in bankruptcy herein, is hereby directed to forthwith deliver possession of said *personal to* the said John G. Parkhurst upon receiving from him the sum of $3,600.00 in cash.

IT IS FURTHER HEREBY ORDERED that the sale of the consigned goods claimed by the Banner Electric Company to J. G. Parkhurst for the sum of $210.00 be and the same is hereby ratified, approved and confirmed, but the said trustee in bankruptcy is hereby directed to retain possession of said goods claimed by the said Banner Electric Company for the period of five days from and after the 15th day of October, 1913, which time is hereby allowed the said Banner Electric Company to file a petition for review before the District Judge of said District.

Done in open court this 15th day of October, 1913.

R. F. LAFFOON,

Referee in Bankruptcy."

Thereafter appellant on October 15th, 1913, filed its petition for review of the Referee's order aforesaid, as follows:

"To the Honorable R. F. LAFFOON, Referee in Bankruptcy:

Comes now the Banner Electric Works of the General Electric Company and respectfully shows:

I.

That heretofore prior to the sale of the stock belonging to the said bankrupt, your petitioner filed a petition with the Referee asking for the return and the possession of about six hundred nineteen and 73/100 ($619.73) dollars worth of lamp stock belonging to your petitioner, which said stock was held by the bankrupt as agent, a copy of the contract of agency which is marked Trustee's Exhibit No. 1. [37]

II.

That thereafter said stock was sold by the Trustee subject to the confirmation thereof for the sum of two hundred ten (210.00) dollars.

III.

That your petitioner objected to the confirmation thereof and reference is hereby made to the said petition.

IV.

That said sale of the Trustee was confirmed by the Referee on the 15th day of October, 1913.

V.

That the Referee in Bankruptcy erred in the following manner:

1. In permitting a sale of the stock without an appraisement.

2. In construing the contract of appointment of agent, Exhibit No. 1, as a conditional sale instead of

a bailment, and thereby confirming the sale and in ruling that such a contract, in order to protect the manufacturer, must be recorded with the auditor within ten days after such appointment.

3. In refusing an order allowing your petitioner the immediate possession of said Banner Electric stock.

WHEREFORE, your petitioner, feeling aggrieved because of such orders, prays that the same may be reviewed as provided in the Bankruptcy Law of 1898 and General Order XXVII.

Dated this 15th day of October, 1913.

BANNER ELECTRIC WORKS OF THE GENERAL ELECTRIC COMPANY,
Petitioner,
By RALPH WOODS,
Attorney for Petitioner."

—and on October 18th, 1913, the Referee's certificate thereon was filed, as follows:

"To the Honorable EDWARD E. CUSHMAN, U. S. District Judge:

I, R. F. Laffoon, the Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order, a copy of which is annexed to the petition hereinafter referred to, was made and entered on the 17th day of October, A. D. 1913.

That, on the 15th day of October, 1913, the Banner Electric Works, a claimant in this cause, feeling aggrieved thereat, filed its petition for review of the aforesaid order herein, which was granted.

That a summary of the evidence on which such

order was based is as follows: The claimant, the Banner Electric Works, by its petition claimed the return of certain lamp stock in the possession of the trustee of the value of $619.73, to which petition the trustee filed objections and exceptions, to wit:

I.

That the transaction between the Banner Electric Company and the bankrupt was a sale of the said stock to the bankrupt corporation.

II.

That the transaction between the Banner Electric Company and the bankrupt is not an absolute sale was a conditional sale and void as to creditors for the reason that the same was not recorded in the manner and form provided by the law of the State of Washington. [38]

III.

That the title of the said goods under the law and the facts in this case is in the Trustee in Bankruptcy for the benefit of all the creditors of the bankrupt.

IV.

That the Banner Electric Company has treated said transaction as a sale and has filed a general claim setting forth that it is a creditor to the extent of the purchase price of said goods, and that the said petitioner is now estopped from claiming that the title of the said property did not pass to the said Trustee.

Upon the hearing of the petition on motion of counsel for the petitioner, the Banner Electric Company, was allowed to amend its proof of claim filed herein, in such manner as to exclude any of the lamp stock claimed in its petition, if its proof in fact in-

cluded any of that stock, and so disposed of the Trustee's fourth exception herein, and the hearing was had upon the Trustee's Exceptions 1, 2 and 3.

Upon the examination of Mr. Andrus, president of the bankrupt company, at page 6 of the transcript of the testimony, it appears that the Banner Electric Company filed its proof of claim herein, claiming $1,399.00 in full of its account, and that at the same time its agent's monthly report for July 31, 1913, showed the bankrupt indebted to the Banner Electric Company in the sum of $961.29, not including in that sum the amount of stock on hand, which was something like $400.00 in value.

Upon the examination Mr. Ackroyd, secretary and treasurer of the bankrupt corporation, testified, at pages 18, 19, 20 and 21, that he was the agent of the petitioner, the Banner Electric Works, independent of his position as a stockholder in, and an officer of the bankrupt company; that as such agent he kept in storage here in Tacoma, lamp stock of the said Banner Electric Company, and delivered from such warehouse stock to the bankrupt to be sold at retail, upon which he received a commission *a* 5%; that his position as such general agent was well understood by both the bankrupt corporation and the petitioner herein, Mr. Ackroyd also testified on page 23, that the stock on hand was not included in the proof of claim as filed by claimant herein; Mr. Ackroyd further testified, on page 26 of the transcript of testimony, that he held the Banner Electric Company's goods in the warehouse controlled by them. In answer to the following question, 'Did you deliver the goods they were

short of, or a case of goods?' He answered, 'Anything they needed.' Of course, a lot of those lamps were required on jobs and on retail sales. 'Whenever they were needed you let them have them?' Answer, 'Yes.' 'Just as they needed?' 'Yes.'

The Trustee in his first report, filed September 22, 1913, attaches an inventory of the lamp stock on hand in the store September 8, 1913, claimed by the Banner Electric Company at the invoice price of the value of $619.73.

It is claimed that this lamp stock when in the store of the bankrupt for sale was kept separate and apart from the other goods in the house, and that separate accounts were kept of the sales of these goods as required in the contract between the Banner Electric Works and the bankrupt, which is in evidence as Trustee'e Exhibit Number 1, but it does not appear that there was any greater degree of separation as between the Banner Electric stock and other stock than would naturally be the case with any other special line of goods. The said contract purports to be one of agency and while it provides for the return of any unsold [39] stock at any termination of the contract, whether it terminates by its own terms or from some act of the parties, yet it seems to me that its evident purpose was to enable the manufacturer to control the output of his mills and the disposition of his products, and that when his goods are put in the hands of his so-called agents for sale, that the sale is absolute so far as creditors are concerned, and that upon the termination of an agency as between the

agent and the manufacturer, he could require the return of the unsold goods in accordance with his scheme of protecting and controlling his sales. The effect of this contract is to give the agent 60 days' credit, and ten days' further time in which to report sale of the goods actually disposed of, but there is nothing in the contract to prevent the said agent paying for all of the goods upon their receipt, but at the expiration of the 60 days plus 10 days the payment would constitute a sale of the goods and pass the title from the manufacturer. Section 8 of the said contract provides that the agency may be terminated by notice in writing to the company in event that the agent shall be, or become insolvent.

It appears from the testimony of Mr. Ackroyd, and from the claims for unpaid salary filed by Mr. Ackroyd and the president, that their wages of $30.00 per week was in arrears and had not been regularly paid them for quite a long period, and with other indebtedness against the bankrupt, which was well known to Mr. Ackroyd, which knowledge was sufficient to apprise the Banner Electric Company of the inability of the bankrupt to meet its obligations, but the petitioner took no steps to terminate the contract.

Section 2 of the contract shows that it was the intention of the parties that the agent should have and maintain a 30 to 60 days' supply of stock as estimated by the agent, and under Section 6 of the contract it was contemplated that the agent should settle every 30 days, upon the 10th of the month, and pay for all lamps that had been sold and collected for, and also to pay for the lamps that had been sold and had not

been paid for for more than a month, which, to my mind, shows that it was expected in the making of said contract to the agency that within 60 days plus 10 days. This contract expires by its terms on the 8th day of July, 1913, and the adjudication in bankruptcy was had on the 14th day of August, 1913, no change having been made in the conduct of the business within that period.

It is my opinion that all of the lamp stock put into the store by the Agent, Mr. Ackroyd, from the Banner Electric Company's warehouse was sold to the bankrupt, and there was no expectation or intention on the part of the said agent that any of it would be taken back by the Banner Electric Company. I think this case is similar to the case, In re Graves & Labelle, No. 5030, decided by the Honorable Edward E. Cushman about June 27, 1913, and therefore sustained the exceptions filed by the trustee, and denied the application of the Banner Electric Company.

That the question presented on this review is: Whether or not the petitioner, the Banner Electric Company, is entitled to the possession of a certain stock of lamps now in the possession of the Trustee in Bankruptcy herein.

I hand up herewith for the information of the Judge the following papers:

1. Petition for review.
2. Order denying the application and confirming sale.
3. Petition for the delivery of the goods.
4. Objections to the confirmation of the sale. **[40]**
5. Objections and exceptions of the Trustee.

6. Trustee's first report.

7. Minutes of the meeting of October 11, 1913.

8. Transcript of the testimony taken September 10, 1913.

9. Transcript of the testimony taken October 15, 1913.

10. Trustee's Exhibit Number 1.

11. Petitioner's Exhibit 'A.'

12. Petitioner's Exhibit 'B.'

Dated October 18, 1913.

Respectfully submitted,

R. F. LAFFOON,

Referee in Bankruptcy."

Thereafter on January 12, 1914, the decision of the Referee was confirmed by the District Court, as follows:

"This matter coming on on review of the Referee's decision, it is now ORDERED that the Referee's decision be and the same is hereby affirmed.

January 12, 1914."

Nothing herein contained shall be held to preclude the Respondent from calling in question the jurisdiction of the Appellate Court to hear and determine this appeal, either as to the subject matter thereof or as to the method adopted to present said appeal to said Court.

Dated July 14, 1914.

FRANK H. KELLEY,
RALPH WOODS,
Attorneys for Claimant and Appellant.
WALTER M. HARVEY, and
G. C. NOLTE,
Attorneys for Respondent and Appellee.

Approved July 15, 1914.

EDWARD E. CUSHMAN,
District Judge.

(Filed July 15, 1914.) [41]

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

GENERAL ELECTRIC COMPANY, a Corporation,
Petitioner,

vs.

C. A. BROWER, Trustee in Bankruptcy of the Estate of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, a Corporation, Bankrupt,
Respondent.

In the Matter of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, a Corporation, Bankrupt.

Citation on Appeal [Copy].

To C. A. Brower, as Trustee in Bankruptcy of the Estate of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupts, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the 30th day of July, 1914, pursuant to a petition on appeal and assignment of error filed in the Clerk's office of the District Court of the United

States for the Western District of Washington, holding terms at Tacoma, in the above-entitled matter, in which the General Electric Company, a corporation, is claimant, to show cause, if any there be, why the judgment rendered in such cause, confirming the order of the Referee in Bankruptcy disallowing and expunging the claim of said General Electric Company, as in said petition of appeal mentioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf. **[42]**

WITNESS, the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, this 30th day of June, 1914.

[Seal] EDWARD E. CUSHMAN,
Judge.

Copy of the foregoing citation received this —— day of July, 1914.

_____,
Attorney for C. A. Brower, Trustee. **[43]**

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2375.

GENERAL ELECTRIC COMPANY, a Corporation,
Petitioner,

vs.

C. A. BROWER, Trustee in Bankruptcy of the Estate of ANDRUS–CUSHING LIGHTING FIXTURE COMPANY, a Corporation, Bankrupt,
Respondent.

In the Matter of ANDRUS–CUSHING LIGHTING FIXTURE COMPANY, a Corporation,
Bankrupt.

Affidavit of Service [of Citation on Appeal].

State of Washington,
County of Pierce,—ss.

Geo. A. Anderson, being first duly sworn, on oath deposes and says: That he is, and at all times hereinafter mentioned was, a citizen of the United States, a resident of Tacoma, Pierce County, Washington, over the age of twenty-one years, not a party to nor interested in the above-entitled action and is competent to be a witness therein; that at Tacoma, Pierce County, Washington, on the 6th day of July, 1914, he served the citation on appeal in the above-entitled action by delivering to and leaving with Walter M. Harvey, the attorney for C. A. Brower, trustee in bankruptcy of the estate of Andrus-Cushing Lighting Fixture Company, a corporation, bankrupt, re-

spondent in the above-entitled action, a full, true and correct copy of said citation on appeal.

GEO. A. ANDERSON.

Subscribed and sworn to before me this 6th day of July, 1914.

[Seal] RALPH WOODS,

Notary Public in and for the State of Washington, Residing at Tacoma. **[44]**

"Filed in the U. S. District Court, Western District of Washington, Southern Division. Jun. 30, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." **[45]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing and attached are true and correct copies of the record and proceedings in the case of Andrus-Cushing Lighting Fixture Company, Bankrupt, No. 1398, as required by the stipulation of counsel filed herein, as the originals thereof appear on file in said court, at the city of Tacoma, in said District.

I hereby certify that the cost of preparing and certifying the foregoing record is the sum of $33.40, which amount has been paid to me by the attorneys for the appellant herein.

I further certify that I attach hereto the original

Citation with affidavit of service in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and the official seal of this Court, at Tacoma, in said District, this twenty-second day of July, A. D. 1914.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk. **[46]**

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

GENERAL ELECTRIC COMPANY, a Corporation,
Petitioner,

vs.

C. A. BROWER, Trustee in Bankruptcy of the Estate of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, a Corporation, Bankrupt,
Respondent.

In the Matter of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, a Corporation,
Bankrupt.

Citation on Appeal [Original].

To C. A. Brower, as Trustee in Bankruptcy of the Estate of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt, Greetings:

You are hereby cited and admonished to be and appear at a session of the United States Circuit

Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the 30th day of July, 1914, pursuant to a petition on appeal and assignment of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, holding terms at Tacoma, in the above-entitled matter, in which the General Electric Company, a corporation, is claimant, to show cause, if **[47]** any there be, why the judgment rendered in said cause, confirming the order of the Referee in Bankruptcy disallowing and expunging the claim of said General Electric Company, as in said petition of appeal mentioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, this 30th day of June, 1914.

[Seal] EDWARD E. CUSHMAN,
Judge.

Copy of the foregoing citation received this —— day of July, 1914.

_____,
Attorney for C. A. Brower, Trustee. **[48]**

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2375.

GENERAL ELECTRIC COMPANY, a Corporation,
Petitioner,

vs.

C. A. BROWER, Trustee in Bankruptcy of the Estate of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, a Corporation, Bankrupt,
Respondent.

In the Matter of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, a Corporation, Bankrupt.

Affidavit of Service [Citation on Appeal (Original)].

State of Washington,
County of Pierce,—ss.

Geo. A. Anderson, being first duly sworn, on oath deposes and says: That he is, and at all times hereinafter mentioned was, a citizen of the United States, a resident of Tacoma, Pierce County, Washington, over the age of twenty-one years, not a party to nor interested in the above-entitled action and is competent to be a witness therein; that at Tacoma, Pierce County, Washington, on the 6th day of July, 1914, he served the citation on appeal in the above-entitled action by delivering to and leaving with Walter M. Harvey, the attorney for C. A. Brower, trustee in bankruptcy of the estate of Andrus-Cushing Lighting Fixture Company, a corporation, bankrupt, respondent in the above-entitled action, a full, true

and [49] correct copy of said citation on appeal.

GEO. A. ANDERSON.

Subscribed and sworn to before me this 6th day of July, 1914.

[Seal] RALPH WOODS.

Notary Public in and for the State of Washington, Residing at Tacoma. [50]

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. General Electric Company, a Corporation, Petitioner, vs. C. A. Brower, Trustee in Bankruptcy of the Estate of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt, Respondent. In the Matter of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 30, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. No. 2375. [51]

[Endorsed]: No. 2449. United States Circuit Court of Appeals for the Ninth Circuit. General Electric Company, a Corporation, Appellant, vs. C. A. Brower, as Trustee of the Estate of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Received and filed July 24, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

No. 2449.

GENERAL ELECTRIC COMPANY, a Corporation,
Appellant,

against

C. A. BROWER, as Trustee of the Estate of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

FRANK H. KELLEY,
RALPH WOODS,
Attorneys for Appellant.

CHARLES NEAVE,
JOHN M. GEARIN,
EDWARDS H. CHILDS,
Of Counsel.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GENERAL ELECTRIC COMPANY, a Corporation,
Appellant,

against

C. A. BROWER, as Trustee of the Estate of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

This is an appeal from a final order made by the District Court for the Western District of Washington, Southern Division, on January 12, 1914, determining a controversy between the parties which arose in the matter of the bankruptcy of the Andrus-Cushing Lighting Fixture Company, a corporation. The case is presented upon an agreed statement filed by the parties under Rule 77 of the General Equity Rules promulgated by the Supreme Court, and the facts thereof are as follows:

On July 8, 1912, the Appellant, General Electric Company, entered into a contract with the Andrus Company in which it agreed to consign incandescent lamps manufactured by it to the Andrus Company for sale by that Company on a commission basis (pp. 28-33). The parties entered upon the performance of that contract, lamps were consigned thereunder, and in the following year, on August 14, 1913, the Andrus Company, having gotten into difficulties, was adjudicated a bankrupt. At the time of the adjudication lamps which had been consigned under the contract and had not been sold were in the possession of the Andrus Company as the consignee, and they were subsequently taken by the trustee, who was appointed in the bankruptcy proceedings and who claimed the right to hold them for the benefit of creditors. Thereupon, and on October 8, 1913, the General Electric Company filed a petition in the bankruptcy proceedings claiming title to the lamps (p. 36) and on October 15, 1913, filed objections to the confirmation of a sale thereof by the trustee (pp. 37, 38). The petition and objections came on for hearing before the Referee in bankruptcy, and the trustee then contended that the contract under which the lamps had been consigned contemplated an actual sale to the Andrus Company, and that if the sale was not absolute, it was conditional and void as to creditors, because the contract was not recorded under a certain statute of the State of Washington (p. 43). The statute upon which the trustee relied (Rem. & Bal. Codes and Statutes, Sec. 3670) is as follows:

> "All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, encumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's of-

fice of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides."

The Referee sustained the trustee's contention, and by an order made in open Court upon the authority of *In re Graves & Labelle,* a case decided by the District Court a short time before, denied the petition (pp. 38 to 40). The case upon which he relied, however, was subsequently reversed by this Court (*In re Graves* and *Berry Bros.* v. *Snowden,* 209 Fed. 336).

A petition for review was immediately filed, and the case was thereupon certified to Hon. Edward E. Cushman, District Judge, by certificate of the Referee, dated October 18, 1913 (pp. 42 to 47), and on January 12, 1914, the order which affirmed the decision of the Referee, and from which this appeal is taken, was made by the District Court (p. 48).

The contract under consideration was not recorded under the Washington statute, and it follows that if it provided for a conditional sale of lamps to the Andrus Company, or a lease with a conditional right to purchase, the Referee and the Court below were right in denying the Appellant's petition, for the statute would operate to make the sale absolute as to creditors and the trustee would succeed to their rights (Bankruptcy Act, Section 47, clause 2, sub-division a).

If, on the other hand, the contract created an agency for the sale of lamps owned by the General Electric Company, and the Andrus Company had possession as agent or factor only, for the purpose of making sales to the public, then neither its creditors nor the trustee would have any right whatever to the lamps and the trustee should have been ordered to give them up to the General Electric Company as the true owner. As this Court has recently said in *Berry Bros.* v. *Snowdon,* 209 Fed., 336, at p. 340: "While it is true that under the amendment of the Bankruptcy Act of June 25, 1910, a

trustee in bankruptcy is vested with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the lien so given is a lien on the property of the bankrupts and not a lien on the property of third persons."

The controversy, then, is with respect to the title to the lamps and turns on the meaning of the contract under which they were delivered. The contract must speak for itself, and is as follows:

"APPOINTMENT OF AGENT.

"INCANDESCENT LAMPS.

"The General Electric Company, a New York corporation (hereinafter called the 'Manufacturer'), hereby, through the General Manager of its Banner Electric Works, at Youngstown, Ohio, appoints Andrus-Cushing Ltg. Fixt. Co. of Tacoma, Wash., (hereinafter called the 'Agent'), an Agent to sell for it its Banner Incandescent Lamps manufactured under United States Letters Patent, of the types and classes hereinafter specified, upon the terms and subject to the conditions herein set forth, and said Agent hereby accepts the appointment, and agrees to comply with said terms and to perform all conditions hereof.

1. The Agency hereby created shall continue for the period of one year from July 8th, 1912, unless sooner terminated as herein provided.

2. The Manufacturer agrees to maintain in the custody of the Agent, to be disposed of as herein provided, a stock of its Banner Gem (metalized filament), Mazda (Tungston) and Tantalum patented incandescent lamps; all of the lamps in such consigned stock shall be and remain the property of the Manufacturer until the lamps are sold, and the proceeds of all lamps sold shall be held for the benefit and for the account of the Manufacturer until fully accounted for as hereinafter provided. The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the Manufacturer; but its intent is to maintain the stock on an average basis of from 30 to 60 days' supply, as

estimated by the Agent. All lamps shipped hereunder by or on behalf of the Manufacturer either to the Agent or upon his request during the continuance of this Agency, shall be subject to the same terms, conditions and agreements as if shipped to said stock, whether or not so specified. The Agent shall return to the Manufacturer, at any time when directed by it, all or any part of the said lamps that have not been sold, and any duly authorized representative of the Manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored.

3. The agent is hereby authorized (a) to sell to anyone, lamps from said stock in broken package quantities at broken package prices, and in standard package quantities at standard package prices, and (b) to sell lamps from said stock to any purchaser under standard forms of contract made by the Manufacturer and under which the Agent may be given, by the Manufacturer, written authority to deliver lamps at the prices fixed in said contracts, and (c) to sell, at prices on the same basis as those in standard forms of contract, lamps from said stock to any purchaser, not under contract, for the purchaser's immediate use; but sales under this subdivision (c) may be made only on written permission from the Manufacturer first obtained in each instance. All sales shall be made only at such prices and upon such terms as may be established by the Manufacturer; the present prices and terms being contained in the schedules presented herewith, which are subject to change on written notice from the Manufacturer from time to time.

Upon all bills and invoices for lamps sold by the Agent shall appear the words: 'Agent for Banner Incandescent Lamps of General Electric Company.' The Agent has no authority to sell or transfer or in any way dispose of such lamps, except as herein expressly provided, and shall not control, or attempt to control, the prices at which any purchaser shall sell any of such lamps. The due payment to the Manufacturer for all sales made hereunder by the Agent shall be and hereby is guaranteed by said Agent.

The Agent shall conform to the educational and engineering instructions of the Manufacturer, and shall advise with and instruct prospective purchasers as to the classes and types of lamps best suited to their several requirements in order to secure a maximum illumination for a minimum expenditure, and shall conduct the business hereunder to the satisfaction of the Manufacturer.

4. All of the Agent's books and records relating to his transactions in connection with the sale and distribution of the Manufacturer's lamps shall at all times during business hours be open to the inspection of any duly authorized representative of the Manufacturer.

5. The Agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expense incident thereto and to the accounting and collection of accounts thus created. The Agent shall be allowed as compensation for the performance of all obligations hereunder, the difference between the amounts received from the sale of the lamps and their value on the basis of a discount of 29 per cent from list prices as to the time fixed by the Manufacturer. The Manufacturer agrees that if the Agent sells, during the period of this appointment, a quantity of lamps the value of which would entitle him to a higher basis of compensation, as shown in Schedules presented herewith, the Manufacturer will at once credit the Agent with an amount equal to the difference between the compensation he has been receiving and the compensation he then becomes entitled to.

6. The Agent shall render to the Manufacturer not later than the tenth of every month, a report, on forms provided by the Manufacturer, covering his sales of the Manufacturer's lamps during the preceding calendar month.

The Agent shall pay over to the Manufacturer, not later than the tenth of every month, an amount equal to the total sales value of all lamps sold hereunder, less the compensation due the Agent, for which collections have been made by the Agent during the preceding calendar month, and a further amount equal to the total sales value less the compensation due the Agent, on all lamps sold by the Agent to cus-

tomers whose accounts covering such lamps are, on the first of the month, past due, according to the Manufacturer's standard terms of payment.

If reports are forwarded as provided in this clause, and are accompanied by a remittance covering in full the lamps sold by the Agent during the preceding calendar month, whether or not such accounts have been collected, such remittance may be the total sales value of the lamps sold, less the compensation due the Agent, and less 5 per cent of the amount so arrived at, which 5 per cent shall be allowed as an additional compensation for such payment and service.

7. The Agent shall, on or before the 15th day of January and July, make and forward to the Manufacturer, on forms provided by the Manufacturer, a complete itemized report or inventory of all of the Manufacturers' lamps on hand at the close of business on the last day of the preceding calendar month, and shall render a similar report within 15 days after the termination or expiration of this appointment with reference to all such lamps on hand at the date of such expiration or termination. At the time for rendering each such report, the Agent shall pay to the Manufacturer the value of all lamps lost from the aforesaid stock or damaged, on the basis of list prices, less a discount of 29 per cent.

8. The agency hereby created may be terminated by notice in writing to the Agent in the event that the Agent shall be or become insolvent or in the event of a breach by the Agent of any of the terms or conditions of this appointment. The expiration or termination of this Agency for any reason shall be without prejudice to the rights of the Manufacturer against the Agent, and immediately upon any such expiration or termination the Agent shall deliver to the Manufacturer all lamps consigned hereunder and that remain unsold and shall fully perform all obligations of the Agent that then remain unfulfilled.

This appointment is hereby signed for the General Electric Company, the Manufacturer, by the General Manager of its Banner Electric Works or

his duly authorized representative located in the sales office of its said works at Youngstown, Ohio.

(Signed) N. L. NORRIS,
General Manager Banner Electric Works.

Accepted:

(Signed) ANDRUS-CUSHING LTG. FIXTURE CO.

F. L. CUSHING, Tr.,
Agent."

It was then stipulated that "in pursuance of said contract and in accordance with its terms, the lamps in controversy in this proceeding were delivered by the General Electric Company through its Banner Electric Works to the Andrus-Cushing Lighting Fixture Company and that the value of said lamps is $600.00", and that "the bankrupt Company paid all expenses in storage taxes, insurance, cartage, transportation, handling and sale of all lamps delivered to it in accordance with the contract above set out:" (p. 34).

It also appeared that one Ackroyd acted for the General Electric Company in supplying the Andrus Company with lamps from a warehouse in Tacoma, and received a commission for his services, that after the contract was made he became a stockholder and an officer of the Andrus Company, that this was understood by all parties, that when the Andrus Company became financially embarrassed he knew about it, by virtue of his connection with that Company, and that the General Electric Company took no steps to terminate the contract (p. 46).

The stipulation then closes, reserving to the Appellee the right to question the jurisdiction of the Court "to hear and determine this appeal" (p. 48).

Specification of Errors.

The Referee and the Court below erred in holding that the lamps in controversy had been sold, either ab-

solutely or conditionally, to the Andrus Company, and in failing to hold that they were in the possession of that Company as agent or factor only. They also erred in refusing to hold that the General Electric Company was the owner of said lamps, and in refusing to direct that they be returned to that Company.

BRIEF OF THE ARGUMENT.

POINT I.

The case presented for review is a "controversy arising in bankruptcy proceedings" within Section 24-a of the Bankruptcy Act and may therefore be reviewed by appeal.

The Bankruptcy Act, in Section 24-a, provides that controversies in bankruptcy proceedings may be reviewed by appeal, and in Section 24-b provides that proceedings of the Courts of bankruptcy may be reviewed by petition.

The Supreme Court has expressly held that a petition by a third party claiming title to goods in the hands of a trustee is a controversy arising in bankruptcy proceedings, reviewable by appeal under Section 24-a.

> *Hewit* v. *Berlin Machine Works,* 194 U. S., 296;
> *Coder* v. *Arts,* 213 U. S., 223, 233, 234;
> *Matter of Loving,* 224 U. S., 183.

In *Coder* v. *Arts,* the Court said, at pages 233 and 234:

> "It is therefore apparent that the mode of appeal in a given case depends upon the character of the proceeding. And the question to be solved in such cases is, Does the case present a proceeding in bankruptcy or is it a controversy arising in bankruptcy proceedings?

> A reference to the adjudications in this Court may assist in clearing the matter. *Hewit* v. *Berlin Machine Works,* 194 U. S., 296, is an illustration of a controversy arising in bankruptcy proceedings (Section 24a) wherein the appeal is under Section 6 of the act of March 3, 1891. In that case the Berlin Machine Works asserted title to the property in the possession of the trustee, and intervened in the bankruptcy proceedings, raising a distinct and separable issue as to the title to property in the possession of the trustee. This court, speaking through the Chief Justice, held that the case presented a controversy arising in bankruptcy proceedings appealable to the courts of appeal as other cases under Section 6 of the act of March 3, 1891."

The General Electric Company, a third party, filed its independent petition asserting title to the lamps. It "intervened in the bankruptcy proceeding, raising a distinct and separable issue as to the title to property in the possession of the trustee" and it follows that the order denying its petition may be reviewed by appeal.

If the proceeding had not been instituted by a stranger but had been a proceeding by the trustee himself to obtain an adjudication as to title to property not in his possession, it might well have been held a proceeding in bankruptcy and subject to review by petition on the authority of *First National Bank of Chicago* v. *Chicago Title and Trust Co.,* 198 U. S. 280. The distinction between claims by third parties and claims by the trustee is well stated in the case of In re *M'Mahon,* C. C. A., Sixth Circuit, 147 Fed. 684, at page 689, where Judge Lurton said:

> "Between *Hewit* v. *Berlin Machine Works* and *First National Bank of Chicago* v. *Chicago Title and Trust Co.,* there is this distinction: In the first case the stranger voluntarily came in and set up a claim against property in possession of the bankrupt's trustee. Very clearly that made one of those independent controversies which may arise in a bankruptcy proceeding or in any other where the *res* is

in *custodia legis* and was appealable under section 24a. In the later case the same kind of issue arose, but it arose upon the application of the trustee for an order of sale and as incident to that the determination of a claim against the property held by one not a party to the proceeding. The latter is plainly held to be a 'proceeding in bankruptcy' not appealable, but reviewable in matters of law only upon an appeal to the supervisory powers of the Court of Appeals under section 24b."

And in *Coder* v. *Arts, supra,* the court said at p. 234:

"Nor is the decision in *Hewit* v. *Berlin Machine Works* inconsistent with *First National Bank of Chicago* v. *Chicago Title and Trust Co.,* 198 U. S. 280. In that case there was an attempt on the part of the trustee to invoke an adjudication as to the title to property which the District Court found not to be in the possession of the trustee, notwithstanding the petition of the trustee had averred possession" * * *.

The order which denied the petition to reclaim in the case at bar also confirmed the sale made by the trustee against the petitioner's objections, and this separate proceeding by the trustee himself may well be reviewed on the petition to revise which has been filed under section 24b (Case No. 2375). The question of law however, is precisely the same in both cases.

POINT II.

The contract under consideration was intended to be performed, and was in fact performed, in the State of Washington, and the legal effect thereof must therefore be determined by the law of that State.

The contract itself provided that lamps were to be consigned thereunder to the Andrus Company "of Tacoma, Washington" (p. 29), and in performance of the contract, lamps were, in fact, delivered to the Andrus Company from a warehouse in which they were stored in that City and State (p. 35). The contract, therefore, was not only intended to be performed, but was, in fact, performed in the State of Washington, and it follows that the effect thereof must be determined by the law of that State. As the Supreme Court said in *Andrews* v. *Pond,* 13 Pet., 64, at p. 77:

> "The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance."

See also *Pinney* v. *Nelson,* 183 U. S., 144, 151.

POINT III.

Under the law of Washington title to the lamps in controversy is in the appellant.

The case of *Eilers Music House v. Fairbanks, et al.,* decided by the Supreme Court of Washington on July 11,

1914, and reported in the advance sheets of "Washington Decisions" issued under date of July 22, 1914, on page 287, has declared the law of that State upon the issue involved in the case at bar, for it construed a similar contract, determined the effect thereof upon the title to property, and thus laid down a rule of property which will be followed by the Federal Courts. The action was replevin and involved the question of title to a piano which had been consigned for sale. The Court said at pages 287 and 288:

> "The contract which the appellant accepted, and under which the piano in question passed from the possession of the appellant, is, in substance, as follows: Goodman and Helgesen, on May 6, 1912, addressed a letter or order to the appellant, in which they say:
>
> 'We will take from you a consignment at Seattle * * * 100 player pianos of the Marshall & Wendall make * * * at the agreed price of $360. f.o.b. Seattle, including player piano bench with each player, *which we agree to sell* at not less than your stock price of $650 without having your written consent so to do * * *. We agree to order and sell exclusively for you * * *. We will keep all goods in our hands fully insured and have policies in case of loss made payable to you and deposit such policies with you. We will pay all taxes levied on such goods as you may consign to us while the same are in our hands or possession. Our consignment account shall at no time exceed $8,000. Instruments consigned to us shall be subject to your order after 90 days from date of shipment to us, and we also agree to pay you in cash on the first of each month interest at the rate of six per cent per annum on the billing price of all goods and instruments remaining on our hands longer than ninety days from date of shipment. We will endeavor to sell all instruments consigned to us within sixty days from the date of shipment to us, and will promptly remit to you cash or approved customers' contract notes which will always be subject to your approval with security on the instruments sold * * *. For the purpose of

forming the basis upon which our compensation is to be fixed for the sale of such instruments and attending to collections or whatever else you may call upon us to do, instruments are to be invoiced to us as agents, at prices as above stated, and we agree that our compensation and commission hereunder shall be such sum or sums as we may sell said instruments for in excess of such billing * * *. We will send you a report on the first day of each and every month of all instruments remaining unsold and make prompt returns as soon as sales are made.'

The whole tenor of the instrument shows that the goods were to be consigned for sale upon commission, and that there was no conditional sale, because the contract does not create the relation of vendor and vendee.'',

and said further, at p. 290:

"The contention of respondent that the contract in question is a conditional sale within the meaning of Rem. & Bal. Code, Section 3670 (P. C. 349, Section 35), as construed in *Eisenberg* v. *Nichols,* 22 Wash. 70, 60 Pac. 124, 79 Am. St. 917, is not sound. The statute is that 'all conditional sales of personal property or leases thereof containing a conditional right to purchase' etc., where the property is placed in the possession of the vendee, shall, unless a memorandum of the sale is filed for record, be absolute as to the classes therein named. The contract under review is not a contract for a conditional right to purchase, but is a mere consignment of goods by a principal to a factor to be sold upon commission."

The rule that in determining the law of a State the decisions of the State Courts will be followed, when they are such as to establish a rule of property, is well illustrated in the case of *L. C. Smith & Bro. Typewriter Co.* v. *Alleman,* 199 Fed., 1, which was an appeal from the District Court for the Eastern District of Pennsylvania and involved the question whether a certain contract was a bailment or a conditional sale. The case came on before Circuit Judge Gray and District Judges Bradford and

Witmer. The opinion of the Court was written by Judge Witmer and it appears therefrom that both he and Judge Gray were satisfied that the contract was a bailment in the light of common law principles, as well as the Pennsylvania State cases that were cited. Judge Bradford, however, was apparently of a different opinion, for while he joined in the judgment, he did so on the sole ground that the State cases should be followed, saying at p. 6:

> "I am constrained to join in the judgment of reversal solely for the reason that, the decisions of the Supreme Court of Pennsylvania having established a rule of property in force in that state on the subject of conditional sales and bailments of personal property, the federal courts are under obligation to enforce it there without regard to its soundness or unsoundness."

The rule has also been recognized in this class of cases by the Court of Appeals in the Seventh Circuit, in the case of *In re Galt,* 120 Fed., 64. That was an appeal from the District Court for the Northern District of Illinois, and the court, among other questions, considered whether a *bona fide* purchaser or an execution creditor of a conditional vendee was protected against a claim of the vendor, and said at p. 67:

> "The law of the State of Illinois with respect to conditional sales, as expounded by its supreme court, runs counter to the great weight of authority, but has become a rule of property in that state, and we are bound to observe it."

While it is clear that the case at bar must be determined in the light of the law of Washington, and while the law of that state has been settled by its Supreme Court, there is nevertheless no conflict between the views of that Court and those of other courts throughout the country, as will appear from the authorities discussed in the following point, in which the case is argued on the merits.

POINT IV.

The law of Washington with respect to title to the lamps in controversy is right on principle and is in accord with the authorities in other jurisdictions.

In the absence of a controlling decision in the State of Washington the issues involved would be determined in the light of the principles of the common law with respect to sales and bailments, and the authorities in other jurisdictions, interpreting those principles, would be considered. The same result would be reached, for the Washington case is right, and is in accord with other cases on the subject throughout the country, both State and Federal. That a factor or commission merchant to whom goods of another have been consigned for sale is nothing more than an agent to sell, and has no title to the goods themselves, has never been questioned anywhere. There was some question at one time, however, whether such a transaction was a bailment in view of the old definition of a bailment as the delivery of a thing to be returned, but that definition was criticised by Judge Story and other authorities as too narrow, in that it would not include factors, and it is now universally agreed that such a transaction is a bailment, and that a factor is a bailee. A contract under which goods are consigned for sale, then, may be described as an agency contract, a factorage contract, or as a contract of bailment, and these different legal descriptions of the same thing are used interchangeably by the Courts, as well as in this brief.

We are unable to conceive a legal theory upon which it can be argued that the lamps in controversy were sold to the consignee and do not know the theory or points upon which the appellee will rely. It seems clear, however, that his argument must take one of two courses: It must contend that the contract in question, by its

very terms, created the relation of vendor and vendee and resulted in a sale, or, that while the contract itself created an agency for sale only, there were nevertheless facts outside the contract which showed it to be a mere cover, that the real intention of the parties was to pass title and that the so-called agent or consignee was really a vendee. We propose now to consider these two possible lines of argument. If either one of them is sustained the appellee must win. If they both fail; if the contract really creates an agency for sale and there are no facts outside thereof which show any change whatever in the relation thereby created, the appellant must win.

A. THE CONTRACT CREATES AN AGENCY FOR SALE.

The question whether a contract is really one for the consignment of goods for sale by the consignee to the public generally, or is a contract for the sale of goods to the consignee, has been many times before the courts and the principles in the light of which a particular case must be determined, are well settled.

There is no doubt as to what constitutes a sale. Its essential elements are everywhere the same, and the only question in a given case is whether these elements really exist.

In the case of *In re Allen,* 183 Fed., 172, the Court said, at p. 174:

> "A 'contract of sale' is when there is an agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and an agreement of the latter to buy and pay the agreed price."

In the case of *In re Columbus Buggy Co.,* C. C. A., Eighth Circuit, 143 Fed., 859, Judge Sanborn said, at p. 860:

> "An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale,"

and in defining a conditional sale the same Court said:

> "A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent."

A consignment of goods for sale, however, is something very different and involves no change of ownership whatever. It contemplates a sale in the future, to be made by the consignee, but is not a sale to the consignee. Title remains in the consignor, and the right of the consignee to sell and pass title to a third party is conferred by the consignor as owner and does not exist by virtue of any title in the consignee.

In I, *Mechem on Sales,* it is said in Section 43:

> "Sale, further, is to be distinguished from the creation of an agency to sell. The essence of sale is, as has been seen, the transfer of the title to the goods for a price paid or to be paid. Such a transfer puts the transferee, who has procured the goods to sell again, in the attitude of an owner selling his own goods, and makes him liable to the first seller as a debtor for the price, and not, as an agent, for the proceeds of the resale. The essence of the agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to recall the goods and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a *price* for them before sale or unless sold by the agent.
>
> Agencies to sell are very common; the most familiar types of such agents being the factor or commission merchant, and the general dealer who receives

> goods for sale under what is usually termed a 'consignment.' In the ordinary cases of this nature, the title to the goods remains in the consignor or principal until sale, and the factor or consignee does not become liable as a purchaser except, according to the weight of authority, when he has sold under a *del credere* commission."

The distinction between a contract of sale and an agency or factorage contract is thus perfectly clear.

The General Electric Company might well have agreed to sell its lamps to the Andrus Company and create the relation of vendor and vendee, and it might equally well have agreed to place its lamps in the hands of that Company to sell and create the relation of principal and agent. Either agreement would have been perfectly lawful and the question is, which relation did the parties intend to create? Their intention must be found in the contract and must be determined in the light of the whole instrument. As was said by the Court in *Franklin* v. *Stoughton Wagon Co.*, C. C. A., Eighth Circuit, 168 Fed. 857, at p. 862:

> "The contract must be read in its entirety, and its construction is not to be gathered from any separate provision of it. It is from the whole contract that the intention of the parties is to be gathered."

Each provision of the contract must be considered in the light of all other provisions, and the application of this test in the case at bar will show that the General Electric Company never parted with its title to the lamps and that the Andrus Company held them as agent or factor only.

The contract is entitled "Appointment of Agent" and in the first paragraph the Andrus Company is appointed "Agent to sell" in accordance with the terms of the contract, and the agent "accepts the appointment" and agrees to the terms (p. 29).

In the paragraph which follows, marked "1," it is provided that the agency shall continue for a year, unless otherwise terminated, and in paragraph "2" it is agreed that the General Electric Company, as the Manufacturer or principal, will maintain a stock of lamps "in the custody of the Agent," that "The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the Manufacturer," that "all of the lamps in such consigned stock shall be and remain the property of the Manufacturer until the lamps are sold, and the proceeds of all lamps sold shall be held for the benefit and for the account of the Manufacturer," (p. 29), and that "The Agent shall return to the Manufacturer, at any time when directed by it, all or any part of the said lamps that have not been sold, and any duly authorized representative of the Manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored."

In paragraph marked "3" the agent is authorized to sell at prices and on terms fixed by the manufacturer and at such prices and on such terms only. On all bills and invoices for lamps sold he is obliged to state that he sells as "Agent." He guarantees that all lamps sold by him will be paid for, agrees to "conform to the educational and engineering instructions of the Manufacturer," to advise prospective purchasers as to the classes and types of lamps that will give them "a maximum illumination for a minimum expenditure" and to "conduct the business hereunder to the satisfaction of the Manufacturer" (pp. 30 and 31).

In paragraph "4" it is provided that the manufacturer may inspect the books and records of the agent, and in paragraph "5" the agent assumes obligations with respect to the lamps consigned, which according to the terms of the stipulation (p. 34) were duly performed by the Andrus Company in paying "all expenses in storage taxes, insurance, cartage, transportation, handling and sale of all lamps delivered to it in accordance with the

contract," and in the same paragraph it is provided that the agent shall receive a certain commission on lamps sold by him "as compensation for the performance of all obligations hereunder."

In paragraph "6" it is provided that by the tenth of each month the agent must report the sales made during the preceding calendar month, remit the proceeds of all sales, less his compensation, and perform his guarantee of sales by also remitting for lamps sold to customers whose accounts are past due. An additional compensation is provided in case the agent performs his guarantee before the customer's accounts are due.

In paragraph "7" it is provided that the agent shall make and return complete inventories twice a year and pay for any lamps lost from the stock or damaged, at the list price less 29 per cent., and the last paragraph, "8.", provides that the contract may be terminated if the agent fails to perform on his part or becomes insolvent, and finally, that "The expiration or termination of this Agency for any reason shall be without prejudice to the rights of the Manufacturer against the Agent, and immediately upon any such expiration or termination the Agent shall deliver to the Manufacturer all lamps consigned hereunder and that remain unsold and shall fully perform all obligations of the Agent that then remain unfulfilled."

That is the whole contract under the "terms" of which the lamps in question were delivered to the Andrus Company. It is perfectly clear and admits of but one construction. The General Electric Company retained title and all the rights of ownership, and the Andrus Company undertook to sell the lamps as directed by the owner, to assume certain obligations commonly assumed by factors, to guarantee sales made to third parties, and thus be a *del credere* factor, and to take its pay by commission, based on the value of lamps sold, and an agency for sale was thus clearly created. As was

said by the Court in *Norton & Co.* v. *Melick,* 97 Iowa, 564, at p. 567:

> "when it is plainly and unequivocally expressed in the writing that it is an agency, and not a sale, and the title does not pass, there is no room for construction, and adjudged cases upon other contracts are of no aid in reaching a correct conclusion."

The question of title is one of intention and is settled by the express provision of the contract that it "shall be and remain" in the General Electric Company, unless, of course, the other provisions are inconsistent, and unless, upon the whole contract, a contrary intention clearly appears. The other provisions, however, are not only in all respects consistent, but most of them show affirmatively that the parties could not have intended to pass title, for the idea of a sale is expressly negatived throughout the whole instrument, and the elements necessary to constitute a sale do not appear at all. There is no inconsistency whatever, and each provision of the contract either shows affirmatively that it was not intended to pass title, or is wholly consistent with the express declaration that title did not pass.

We propose to consider and determine the legal effect of every provision of the contract and will take up, first, those which expressly confirm the agreement that title shall remain in the General Electric Company, and, second, those relating to the obligations assumed by the agent.

I. The provision that title shall remain in the General Electric Company is expressly confirmed by the following further provisions:

It is expressly confirmed by the provision that the proceeds of sales "shall be held for the benefit of the

manufacturer'' for a trust is thus imposed on the proceeds and the beneficial interest of the Andrus Company therein is expressly limited to its commission.

It is also expressly confirmed by the provision under which the Andrus Company was obliged to return any part of the stock on hand at any time and to return ''all lamps'' on hand and not sold immediately upon the expiration and termination of the contract.

In the case of *In re Galt,* C. C. A., Seventh Circuit, 120 Fed., 64, Judge Jenkins said at p. 68:

> ''The real intent of the contracting parties must be ascertained from all the provisions in the agreement which express the contract, bearing in mind always that in a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement, express or implied, to pay the purchase price of the thing sold. The test would seem to be—Has the sendor the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money?''

In the case of *John Deere Plow Co.* v. *M'David,* C. C. A., Eighth Circuit, 137 Fed., 802, Judge Riner said at p. 810:

> ''The plow company had the right, under the contract, to require the goods returned, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money, or its equivalent, for the goods delivered, with no obligation to return.''

In the case of *In re Columbus Buggy Co.,* C. C. A., Eighth Circuit, 143 Fed., 859, Judge Sanborn said at p. 861:

> ''The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment.''

In *Eldridge* v. *Benson,* 61 Mass., 483, the Court said, at p. 485:

> "The leading feature of the agreement, which of itself would be quite sufficient to determine its meaning, is the right reserved to the defendant to return such portion of the books, delivered to him under the contract, as might not be disposed of by the agents. Such a stipulation is wholly inconsistent with an absolute sale of the property to the defendant, and clearly indicates the intent of the parties to have been, that the right of property should remain in the claimant. The elementary definition of a sale is the transmutation of property from one man to another; but no such change takes place, when it is agreed between parties that property may be returned to the person from whom it was received."

A bailment is also evidenced by the provisions which give the manufacturer the right of access to the consigned stock, and the right to inspect the agent's books and records with respect to sales made therefrom and which require the agent to state that he sells as agent on all bills and invoices, to conform to all educational and engineering instructions of the manufacturer and to conduct the business of selling the manufacturer's lamps to its satisfaction. When goods are sold, this intimate control is not retained, but when they are delivered to an agent for sale and the principal gets nothing until they are sold by the agent, such control is retained as a matter of course. It is wholly inconsistent with the idea of a sale, and is not only consistent with, but is demanded by, the conditions of a bailment for sale.

The provisions that the manufacturer alone shall determine the quantity of lamps to be consigned, and that lamps may be sold only at prices fixed by the manufacturer and subject to change, are further evidence to the same effect. They set forth a natural and consistent factorage arrangement, and would be, to say the least,

most unusual terms for a contract of sale. If the contract had been to sell the lamps to the Andrus Company, it would have been obliged to purchase whatever quantity the manufacturer chose to deliver during the entire term of the contract and at whatever prices the manufacturer chose to name.

II. The obligations assumed by the Agent are consistent with the agreement that title shall not pass.

(a.) The Agent's guaranty of sales makes him a del credere agent and does not indicate a sale.

The contract provides that "The due payment to the Manufacturer for all sales made hereunder by the Agent shall be and hereby is guaranteed by said Agent". The only effect of this, however, is to make the Andrus Company *a del credere* agent. In I. *Clark & Skyles,* on the Law of Agency, at p. 968, it is said of such an agent: "He is said to sell on a *del credere* commission". The same authority says further on the same page:

> "It may be laid down as a general rule that if a person consigns goods to another under an agreement by which the consignee is to receive them, and sell them at prices fixed by the consignor, and guarantee payment by the purchasers, and account to the consignor periodically for the proceeds, retaining for himself an agreed commission, the transaction is a *del credere* agency, and not a sale by the consignor to the consignee."

In *Cushman* v. *Snow,* 186 Mass., 169, the Court said, at p. 174:

> "In such a case moreover the guaranty does not transform the essential character of the relation, for the principal retains title to the goods until sold, and then to their proceeds at least until paid to the agent."

In *The Commercial National Bank* v. *Heilbronner,* 108 N. Y., 439, the Court said, at p. 443:

> "As factors, Vanuxem, Wharton & Co. had no title to the consigned goods. The consignor, upon a consignment of goods to be sold on commission, does not part with his title by the consignment, but he continues to be the true owner of the consigned property until sold by the consignee, and the rule is the same whether the consignee is a *del credere* factor, or is under advances for the principal, or is simply an agent for sale, assuming no responsibility except that usually appertaining to the position of an agent. (*Baker* v. *N. Y. Nat. Ex. Bank,* 100 N. Y. 31; *Mellich, L J., Ex parte White,* 6 L. R. Ch. App. 403.) But a factor under advances for his principal, or who guarantees the sale, has a lien on the goods and their proceeds for his advances, and an interest in the debts arising upon sales, to protect his guaranty. He is entitled to retain possession of the goods and their proceeds, to protect his lien and to collect and sue the debts in his own name, rights of which the principal cannot deprive him except by reimbursing the advances, or in case of a *del credere* factor, by relieving him from his guaranty. (*Hudson* v. *Granger,* 5 Barn. & Ald., 27; *Story on Agency,* Sections 398, 407, 408, 424.) But such factors are nevertheless agents and cannot deal with the property or proceeds as their own."

In *National Bank* v. *Goodyear,* 90 Ga., 711, an agent for the sale of goods agreed that as soon as any goods were sold he would pay the principal therefor in cash, regardless of whether he had collected from the purchaser. The principal took the notes of the agent in lieu of cash, and the Court, in discussing this feature of the case, said, at p. 730:

> "What was the effect of taking Goodyear's notes for goods which he had sold, and for which, according to the terms of his contract, he ought to have paid in cash out of the proceeds of sale. Did this vary the contract as to goods not sold, or was anything waived as to them by the consignor, the E. & F.

> Co.? We think not. Surely an agent to sell does not become a purchaser of unsold goods by his principal accepting notes for the price of goods which have been sold. . . . There is no suggestion in the evidence that any of the notes taken from Goodyear covered any part of the goods which he had failed to sell. It has never been heard of as law that a principal may not settle with his agent, and take a note in lieu of cash for which the latter is liable, without breaking up the agency so far as business not yet transacted is concerned. Such an adjustment would not convert the agent into a purchaser even as to goods sold by him for and on account of his principal, much less as to those remaining unsold."

The contract also provides that the agent shall account for all lamps sold and shall perform his guarantee. It provides that by the tenth of each month he shall remit all collections made during the preceding calendar month, less his commissions, and also for all lamps sold to customers whose accounts, on the first of the month, were past due, and that if he remits for such accounts before they are past due, he may have an additional commission. These provisions simply provide for the performance of the obligations assumed by the agent, and the only point to be considered in respect to them is that they disclose a perfectly natural and usual method for the adjustment of accounts between a principal and his agent or factor. Nothing whatever is due from the agent until after he has sold to the public. When sales have been made he must remit the proceeds and when the accounts of his customers are "past due" he must perform his guarantee. When lamps have been sold and accounts therefor are outstanding, but not "past due", he may, but is not obliged to, perform his guarantee and earn a larger commission. No obligation or right to pay, however, arises until sales have been made, and the agent is neither required nor permitted to buy for himself.

(b.) The assumption of liability for loss and the payment of certain expenses by the Agent is not inconsistent with the relation and does not change the bailment into a sale.

The contract provides that "the agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expenses incidental thereto and to the accounting and collection of accounts thus created" (p. 31), and it also provides that he shall be liable to the manufacturer for the value of all lamps lost or damaged (p. 33). These are obligations commonly assumed by the consignee in factorage contracts, and while they enlarge the liability imposed by the common law, they are perfectly lawful agreements and if the contract in which they appear is otherwise an agency or factorage contract, they in no way change the relation of the parties.

In *Sturm* v. *Boker,* 150 U. S., 312, the effect of a bailee's assumption of liability for loss was considered, and the Court said, at p. 330:

> "The complainant's common law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking."

In *Snook* v. *Davis,* 6 Mich., 155, the Court construed a contract in which one Robertson agreed to conduct the business of selling goods for the plaintiff. The contract provided that the goods should "at all times", both during transportation and while in Robertson's possession, "be at the risk of the said Benjamin Robertson". He thus assumed all responsibility for loss or damage to the goods, and the Court said, at p. 165:

> "It is contended that the risk is an incident of ownership, and, therefore, conclusive of the ownership of the goods by Robertson; but, though a usual, it is by no means an inseparable incident—it is only so in the absence of contract to the contrary. It is perfectly competent for a clerk, bailee or any other person dealing in any way with the property of another by contract to take the risk upon himself, as Robertson did in this case."

The same rule applies to the agent's payment of storage, cartage, and other expenses connected with the handling and sale of lamps under the contract, for he is otherwise clearly a factor and the assumption of such obligations is consistent with and does not change that relation.

In the case of *In re Flanders,* C. C. A., Seventh Circuit, 134 Fed., 560, the Court said, at p. 562:

> "The objections that ordinary invoices accompanied the shipments, that such shipments were made direct to Flanders, that the leather was sold by him in his own name, that he allowed credit upon sales, that he guaranteed sales, and that he insured in his own name, do not change the nature of the transaction. It is quite competent for a bailee by contract to enlarge his common-law liability, without converting the bailment into a sale."

In the case of *In re Columbus Buggy Co.*, C. C. A. Eighth Circuit, 143 Fed. 859, the Court construed a contract in which the Agent undertook to bear the expense of insurance, freight, storage and handling of the consigned goods and it was held that the contract was one of bailment only and did not evidence a conditional sale.

In the case of *In re Reynolds,* 203 Fed., 162, a similar contract was construed, in which it was provided that "Said Agent shall transact all business pertaining to the sale of said wagons, and shall pay all taxes, freight, storage and other expenses on same, and keep the same fully protected from the weather, and in good order, all

at the Agent's own expense", and it was held that the contract was a bailment for sale.

See also the authorities cited under B. *infra*.

The principle that a person may lawfully agree to pay expenses connected with another person's goods without thereby becoming the owner thereof, is well settled, and such agreements are often made by factors whose business it is to hold and deal with the goods of other people.

We have now considered all of the provisions of the contract and the whole case thereon,—the case on the entire contract,—is thus presented. The argument speaks for itself, and it is submitted that on the merits and on principle nothing more and nothing less is established than an agency for the sale of lamps.

B. THERE ARE NO FACTS IN THE RECORD TO INDICATE THAT THE TRUE RELATION OF THE PARTIES WAS NOT THAT EXPRESSED IN THE CONTRACT.

Of course, if the actual facts showed that the goods were really sold, then the contract would be a mere cover and a fraud. As the Supreme Court said in *Ludvigh* v. *American Woolen Co.*, 231 U. S. 522, at p. 528, after construing a written contract and finding that it created an agency for sale:

> "It therefore follows that, if there are no other circumstances controlling the situation and establishing that this contract was a mere cover for a fraudulent or illegal purpose, there is nothing in its terms operating to transfer the title to the goods * * * *".

There are no such "other circumstances controlling the situation" in the case at bar. The evidence is very

meager, but what there is is wholly consistent with the lawful purpose disclosed by the contract. It appears that lamps were delivered to the Andrus Company from a warehouse in Tacoma by one Ackroyd, who represented the General Electric Company in making the deliveries and who received a commission for his services. It also appears that, after the contract was made, Ackroyd became a stockholder and an officer of the Andrus Company, that this was understood by all parties, that when the company became financially embarrassed he knew about it by virtue of his connection with that company, and that the General Electric Company took no steps to terminate the contract.

It is difficult to perceive the relevancy of these facts, although the failure of the General Electric Company to terminate the contract, if it may be considered, is most significant of its opinion with respect to title, for it is fair to presume that it would at once cease *selling* to a person unable to pay, while it might well continue to deal with an insolvent factor and give business to him with no risk whatever to itself.

In *M'Cullough* v. *Porter,* 4 Watts & Sargeant, 177, it was held that an agreement to furnish goods to an insolvent to be sold at invoice prices, the insolvent consignee to return the invoice price to the consignor, after sale, and to retain all above that sum for himself and his family, was a bailment, that it was not fraudulent as to the insolvent's creditors and that the consigned goods could not be reached by them.

The only other fact that may be said to be outside the contract itself is that the Andrus Company paid taxes and insurance. The contract itself provided that: "The agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expense incident thereto and to the accounting and collection of accounts thus created," while the stipulation with respect to what the Andrus Company did states

that: "The bankrupt company paid all expenses in storage taxes, insurance, cartage, transportation, handling and sale of all lamps delivered to it in accordance with the contract above set out."

The expenses of taxes and insurance are of the same nature as those expressly set forth in the agreement, and the payment thereof by the agent in no way changed the character of his holding. The point is covered under A. II.b, *supra,* where similar obligations, assumed in the contract, are considered, and where it is expressly shown that the assumption thereof by the factor does not change the relation or indicate a sale. It is of course true that such obligations are incidents of ownership, but the point is that they may be assumed by a person who is not the owner and that the assumption thereof by such a person does not make him the owner, and when, as in the case at bar, the relation of principal and factor is clearly established, the assumption of such obligations by the factor does not change that relation or make him a vendee. There are many authorities to this effect.

In *John Deere Plow Co.* v. *M'David,* 137 Fed. 802, the consignee agreed: "To pay all taxes, license, rents and all other expenses incidental to the safe keeping and sale of the goods and articles of merchandise and to waive all claims against John Deere Plow Company for such expense," and further "to keep said goods and articles of merchandise insured for their full value, at expense of said second party in the name and for the benefit of John Deere Plow Co., in companies approved by them, and to turn over the policies to them, the said John Deere Plow Co., and in case of any neglect or failure to insure as herein provided, to become personally responsible for any loss or damage that may occur to said goods while in the custody of said second party," and it was held that he was an agent or factor only.

In the case of *In re Galt,* 120 Fed. 65, the consignee agreed: "To receive, store, pay freight, and keep under cover, in good condition and fully insured, at his own ex-

pense, all wagons sent him, until sold or ordered away by the party of the first part, as herein provided; to pay all the taxes on wagons on hand should any assessment be made;" and it was held that he was an agent and not a vendee.

In *Franklin* v. *Stoughton Wagon Co.,* 168 Fed. 857, the consignee agreed: "To pay all taxes, license, rents and all other expenses incidental to the safe keeping and sale of said goods and articles of merchandise, and to waive all claims against Stoughton Wagon Co. for such expense," and further "To keep said goods and said articles of merchandise insured for their full value at the expense of said second party in the name and for the benefit of Stoughton Wagon Co., in companies provided by them, and to turn over the polices to them, the said Stoughton Wagon Co., and in case of any neglect or failure to insure as herein provided, to become personally responsible for any loss or damage that may occur to said goods while in the custody of said second party," and he was held to be an agent or factor only.

The contracts in the following cases contained an agreement by the consignee to pay all insurance and taxes free from any claims therefor against the consignor:

Monitor Mfg. Co. v. *Jones,* 96 Wis. 619;
National Bank of Augusta v. *Goodyear,* 90 Ga. 711;
National Cordage Co. v. *Sims,* 44 Neb. 148;
Milburn Mfg. Co. v. *Peak,* 89 Tex. 209;

and they were held to be true agency or factorage contracts and not contracts of sale.

In disposing of the claim that the contract involved in the American Woolen Company case, *supra,* was a mere cover the Supreme Court said at pp. 528-9:

> "It is said that the Horowitzes selected the goods, whereas under the contract the Woolen Company

> had the right to turn over any it saw fit; but this circumstance may be readily explained for the Horowitzes were familiar with and of course interested in their own trade and more likely than anyone else to make proper selections for it, and from the sale of the goods chosen they were to make their profits.",

and further on, p. 529:

> "It is urged that the goods were not kept separately, but it appears that the tags of the Woolen Company were left upon the goods and it is not shown that any creditor relied upon mismarking or misbranding. And memoranda are in evidence showing the names of certain salesmen thereon, but on these same bills it is stated that the goods were furnished under the agreement already referred to.
>
> Against these considerations are the positive terms of the agreement, found to be free from fraud and fairly entered into, which as we interpret them permitted goods unsold to be returned.",

and in conclusion, at p. 530:

> "We are unable to find that this contract was either actually or constructively fraudulent, and hold, as was found in the Circuit Court of Appeals, that it was what it purported to be, a consignment arrangement with the net proceeds of sales to be accounted for to the consignor and with the right to return the unsold goods. Finding no error in the decree of the Circuit Court of Appeals, the same is AFFIRMED."

It is not only perfectly clear that the record contains no material facts outside of the contract, but it is expressly agreed in the stipulation upon which the case is presented, that "the lamps in controversy" were delivered by the General Electric Company to the Andrus Company, "in pursuance of said contract and in accordance with its terms" (p. 34).

Further Authorities on the Whole Case.

The following cases in which contracts similar to that involved in the case at bar are construed and some of which have already been referred to for their bearing on particular points are submitted for their bearing upon the whole case:

In *Union Stock-Yards & Transit Co.* v. *Western Land & Cattle Co.*, C. C. A., Seventh Circuit, 59 Fed., 49, the facts were stated by the Court as follows:

> "Hall agreed to transport the cattle to his farm at his own expense, and there feed them, that they might be profitably marketed by the cattle company. He covenanted that they should not deteriorate in flesh or condition. He bound himself to pay, at an agreed valuation, for all losses of the cattle arising from 'death, disease, escape, theft, or any cause whatever.' He was to employ at his own expense a herdsman selected by the cattle company. The pasturage was to extend over a period of some 14 weeks, during which time the cattle company should ship the cattle to market, or sell them in pasturage. Hall was to receive, in full compensation for his services and expenditures, all moneys realized from the sale of the cattle by the cattle company in excess of $36.05 per head, after deducting the expenses of shipment and sale."

It was held that the transaction constituted a bailment for sale, and Judge Jenkins, writing for the Court, said: "There is wanting here an essential element of a sale,—an agreement to pay a price." He also said at p. 53:

> "It is of the essence of a contract of sale that there should be a buyer and a seller; a price to be given and taken; an agreement to pay, and an agreement to receive. 'Sale' is a word of precise legal import. 'It means, at all times, a contract between parties to give and to pass rights of property for money, which the buyer pays, or promises to pay, to the seller, for

> the thing bought and sold.' *Williamson* v. *Berry,* 8 How. 544. A conditional sale implies the delivery to the purchaser of the subject-matter, the title passing only upon the performance of a condition precedent, or becoming reinvested in the seller upon failure to perform a condition subsequent. It is not infrequently a matter of difficulty to accurately distinguish between a conditional sale and a bailment of property. The border line is somewhat obscure, at times. The difficulty must be solved by the ascertainment of the real intent of the contracting parties, as found in their agreement. There are, however, certain discriminating earmarks, so to speak, by which the two may be distinguished. It is an indelible incident to a bailment that the bailor may require restoration of the thing bailed. Insurance Co. *v.* Randell, L. R. 3 P. C. 101; Jones, Bailm. (3d Ed.), pp. 64, 102; 2 Kent, Comm., Section 589. If the identical thing, either in its original or in an altered form, is to be returned, it is a bailment. Powder Co. *v.* Burkhardt, 97 U. S., 116; Sturm *v.* Boker, 150 U. S. 312, 14 Sup. Ct. 99. In a contract of sale there is this distinguishing test, common to an absolute and to a conditional sale: that there must be an agreement, expressed or implied, to pay the purchase price.'',

and in considering the effect of the provision that Hall should be liable for all losses, said:

> "It would be most unfair, however, to judge the contract by a single clause disconnected from the other stipulations contained in it. We must have regard to the entire agreement to determine the meaning of any part of it. It may well comport with a bailment of property that the bailee assumes the character of insurer of the thing bailed while it remains in his possession, and as to those disasters which he, by the exercise of care, could largely guard against, and which would be greatly promoted by his negligence. It is competent for a bailee so to enlarge his responsibility. Sturm *v.* Boker, 150 U. S. 312, 14 Sup. Ct. 99. Such a clause, read in connection with the other stipulations of the contract, may well be held a wise provision, imposing

upon the bailee, in the care of the cattle while in his custody, the liability of an insurer, stimulating the exercise of care for them."

See also *Metropolitan Nat. Bank* v. *Benedict Co.*, C. C. A., Eighth Circuit, 74 Fed., 182.

In the case of *In re Galt*, C. C. A., Seventh Circuit, 120 Fed. 64, the facts, as well as the law, are stated in the opinion of the Court, on pages 67 and 68, as follows:

"The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements peculiar to each. In bailment the identical thing delivered, is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return. Sturm *v.* Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Union Stock Yards & Transit Co. *v.* Western Land & Cattle Co., 7 C. C. A. 660, 59 Fed. 49. The bailee may, however, by contract, enlarge his common-law liability without converting the bailment into a sale. The real intent of the contracting parties must be ascertained from all the provisions in the agreement which express the contract, bearing in mind always that in a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement express or implied, to pay the purchase price of the thing sold. The test would seem to be—Has the sender the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money?

Carefully analyzing the agreement in hand, we think it must be held that the contract of the parties was one of bailment, and not of conditional sale. The Mitchell & Lewis Company thereby appoints Galt its agent for the sale of its manufacture in the limited territory stated, and in no other place or places; agrees to furnish the goods to the agent at 40 per cent. discount from list prices; they to be sold by him, and accounted for to the company in cash or notes of the purchaser drawn upon blanks furnished by the company, running not more than six months, with interest, and made payable to the company; their payment being guaranteed by Galt. As an in-

ducement to making sales for cash only, an allowance of 5 per cent. on such sales is allowed by the company. All cash is to be remitted not later than the day following the sale; notes to be transmitted every 30 days. If all sales should be upon time, and the notes returned to the company should aggregate more than the prices of the wagons to be accounted for, the surplus is to be returned to Galt when and in proportion to the amount collected. He agrees to sell all wagons within twelve months from date of shipment, and upon failure so to do, at the option of the company, to (1) pay cash for wagons on hand, at the prices stated; or (2) give his note therefor; or (3) store the wagons subject to the order of the company; the ownership of all wagons furnished to remain in the company until settlement as provided; the money and effects received by Galt in the business of the agency in no case to be appropriated to his private use. Galt agrees to store and keep under cover and in good condition all wagons received; to keep them fully insured at his own expense until sold or ordered away by the company; to pay taxes upon them, if any should be assessed; and he is not to sell or assist in the sale of any other wagons than those manufactured by the company.

Applying to this contract the test stated, it is clear that here was a bailment, and not a conditional sale."

See also *In re Flanders,* C. C. A., Seventh Circuit, 134 Fed., 560.

In *John Deere Plow Co.* v. *M'David,* C. C. A., Eighth Circuit, 137 Fed., 802, the following contract was considered:

"This agreement, made and entered into this 15th day of September, 1903, by and between John Deere Plow Co., of Kansas City, Missouri, incorporated under the laws of the State of Missouri, party of the first part, and Hymes Buggy & Impl. Co., of Springfield, County of Greene, State of Missouri, party of the second part.

"Witnesseth, That said first party, for and in consideration of the stipulations and agreements herein

contained, have this day appointed and by these presents do hereby appoint the second party as their authorized agent at Springfield, Mo., for the sale, on commission, of the consigned goods and articles of merchandise designated hereon or enumerated and described on schedules of said second party, to be attached hereto as hereinafter provided.

"The party of the first part agrees to consign to and upon the written request of the said second party, so long as said party of the first part has the goods in stock to enable it so to do, during the continuance of this contract, the goods and articles of merchandise designated hereon, or on schedules or written requests of said second party hereafter made; said schedules or written requests to set forth the net amount to be received for the goods by the party of the first part after the goods shall have been sold by said party of the second part as such agent, and the place to which to be consigned, and when said written requests or schedules properly signed by said second party are accepted by John Deere Plow Co., they shall be attached and made a part of this contract, reference being made to same on the face thereof, subject to the following conditions, agreements and obligations:

"The party of the second part agrees as follows:

"1st. To receive from the Transportation Companies, and pay all transportation charges on same, the goods and articles of merchandise consigned under terms of this contract.

"2nd. To furnish proper warehouse room for all goods and articles of merchandise consigned under terms of this contract.

"3rd. To pay all Taxes, License, Rents and all other expenses incidental to the safe keeping and sale of the goods and articles of merchandise, and to waive all claims against John Deere Plow Co., for such expense.

"4th. To keep said goods and articles of merchandise insured for their full value, at expense of said second party, in the name and for the benefit of John Deere Plow Co., in Companies approved by them, and to turn over the policies to them, the said John Deere Plow Co., and in case of any neglect or failure to insure as herein provided, to become

personally responsible for any loss or damage that may occur to said goods while in the custody of said second party.

"5th. To keep samples of said goods and articles of merchandise set up in salesrooms suitable for the purpose, and to make all reasonable efforts to sell the same; and not to sell any other makes of like goods and articles of merchandise to the exclusion of those consigned under the terms of this contract.

"6th. To sell the goods and articles of merchandise consigned under this contract for enough more (that) the net amounts to be received therefor by said party of the first part, as above stated, and set opposite said goods in the said written request and schedules attached, to pay all freights, taxes, expenses, charges, compensation and commissions for the handling and selling of said goods as herein provided, and the doing of all things herein provided to be done by the party of the second part; it being mutually understood that the said net amounts set opposite said goods in the attached schedules and written requests, are the net prices at which said goods and articles of merchandise are to be consigned for sale, and are the net amounts, which said second party agrees to account for and deliver to the John Deere Plow Co., for said goods when sold, as per terms of this contract. The full charges, compensation, commission and expenses of said second party for the handling and selling of said goods as herein provided, and the doing of all things herein provided to be done by the party of the second part, to be the difference between said net amounts and the gross amounts received from the sale of said goods.

"7th. To sell all goods and articles of merchandise consigned under this contract, subject to the Manufacturer's regular printed Warranty, and to settle all claims for breakage and defects in accordance therewith. And agrees not to part possession with any of the said goods until full and satisfactory settlement shall have been made for same by purchaser, and will not allow, under any circumstances, any of said goods to be taken away on trial before such settlement is made; and that all proceeds of such sales, whether cash, or notes, shall be kept separate and distinct from said second party's other business.

"8th. The second party further agrees to make out and render to the said first party, on the first day of each month, and oftener if so requested, a full and complete report of all sales, made the month previous, or since the last report made; and to accompany said report with a full settlement in accordance with this contract for all goods so reported sold, said settlement to be made with cash for all sales less 5% discount for all cash, months from date of same and bearing interest at per cent., per annum from . And the second party further agrees that when purchaser's notes are given in settlement for sales made as herein provided, said notes will be on blanks furnished by John Deere Plow Co., and are to be taken only from good, prompt paying purchasers. And the second party further agrees to endorse all such notes given to said first party in the following manner, to wit:

"For value received, I or we hereby guarantee the payment of the within note at maturity or at any time thereafter, and waive demand, protest, notice of protest and non-payment.

"9th. It is further agreed and understood, that the goods and merchandise to be supplied hereunder are to be consigned simply, and that the title to and ownership of all goods and articles of merchandise consigned to said second party under the terms of this contract, and all proceeds of the sale of same, shall remain vested in said first party, and be its sole property and subject to its order, until the full amount to be received for said goods, as herein provided, shall have been received by said party of the first part.

"It is further agreed that this contract is to remain in force unless cancelled and annulled by said first party, until Oct. 1st, 1904, at which time said second party agrees if required by said first party, to return all goods remaining on hand unsold at the expiration of this contract to them at their warehouse in Kansas City, in good order and free of all freights and charges.

"This contract is not transferable and should the second party hereto sell out or otherwise dispose of his business at any time prior to its expiration, the right to declare this contract cancelled and annulled

from and after the date of such sale or transfer is reserved to party of the first part, without prejudice.

"The second party hereby agrees to forward any goods received on this contract at any time, and as said John Deere Plow Co., or their authorized agents may direct, charging only actual cost of freight and drayage, collecting same from transportation company as back charges.

"It is also agreed that the contract held by John Deere Plow Co., is to be considered the original, and to be the binding agreement in case the duplicate varies from it in any particular. And that the same may be terminated at any time at the option of the John Deere Plow Co., and the goods remaining on hand unsold shall be subject to the same terms and conditions as herein provided for.

"It is understood and agreed that, in writing and printing, this paper contains the full and entire agreement between the parties hereto, and that no outside oral or written understanding with any traveling agent of John Deere Plow Co., is of any force or effect whatever." * * *

The Court, by Judge Riner, said at p. 810:

"We think it was an agency contract. It is not a contract in which the consignee can sell at any price, or on any terms he may choose, but as we understand it, it is a contract or consignment of goods to be sold on commission by the consignee, as agent for the consignor, for cash. The plow company had the right, under the contract, to require the goods returned, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money, or its equivalent, for the goods delivered, with no obligation to return."

In the case of *In re Columbus Buggy Co.*, C. C. A., Eighth Circuit, 143 Fed., 859, the Court, by Judge Sanborn, said, at p. 860:

"The material terms of this contract were that the goods should be selected from those of the Columbus Company by the Washburn Company and should be shipped and billed to it as agent by the Columbus

Company at the latter's wholesale prices, that the Washburn company might sell the goods at such prices as it saw fit and that it would pay to the Columbus Company the wholesale prices less 5 per cent. discount for the goods it sold in each month by the tenth day of the succeeding month, that it would keep the property insured for the benefit of the Columbus company and would bear all expenses of freight, storage and hauling, that the contract should continue in force one year and that, unless it was renewed, the Washburn company would at its expiration return that portion of the merchandise unsold and the Columbus Company would repay the freight which had been paid upon this portion and that all the goods should be on consignment and the title should remain in the Columbus company and subject to its order until they were sold and paid for in cash. The Columbus Company properly presented to the District Court its claim for that part of the merchandise which the Washburn Company held unsold under this contract and which the trustee had taken at the time of the adjudication, and that court denied its petition upon the ground that the contract evidenced a conditional sale and was therefore voidable under the statute of Oklahoma."

* * * * * * * * *

"An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale. The contract involved in this case has none of these characteristics. The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment.",

and further, at p. 861:

"A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expense of insurance, freight, storage and handling and that he will hold the unsold merchandise subject to the order of the furnisher discloses a bailment for

sale and does not evidence a conditional sale. It contains no agreement of the receiver to pay any agreed price for the goods. It is not, therefore, affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers. The fact that such a contract provides that the receiver of the goods may fix the selling prices and may retain the difference between the agreed prices of the accounting and the selling prices to recompense him for insurance, storage, commission and expenses does not constitute the contract an agreement of sale. It still lacks the obligation of the receiver to pay a purchase price for the goods and the obligation of the furnisher to transfer the title to him for that price."

In *Butler Bros. Shoe Co.* v. *United States Rubber Co.*, C. C. A., Eighth Circuit, 156 Fed. 1, a manufacturing corporation of New Jersey made annual contracts with a corporation of Colorado engaged in the wholesale business in that state, whereby the former agreed to send from its mill and warehouse in Eastern states to the latter in Colorado, upon its orders, rubber boots, shoes, and other rubber goods during the year for sale, and the latter agreed to receive, to store, and to sell them in its name as consignee, and to pay to the former for the goods which the latter sold certain agreed prices, which were so much less than its selling prices to its customers that it secured thereby the expenses of carrying on the business and a liberal commission. The contracts provided that the latter was appointed the agent of the former to sell the goods, that the latter should make advances when requested, that to the amount of its profits it guaranteed the sales, that the goods and their proceeds, until the latter paid the agreed prices, should be the property of the former, and that the latter assumed the risk of the receiving, storing, handling and selling. The manufacturing corporation shipped the goods as agreed. It had no office, warehouse, or place of business in Colorado, and it neither incurred nor paid any of the expenses of

receiving, storing and selling the goods. The Colorado corporation ordered, received, stored, and sold the merchandise at its own expense, in consideration of the factorage secured to it by the contracts.

It was held that the agreements were factorage contracts. The Court said, at p. 5:

> "The question has been exhaustively argued whether this was a contract for a conditional sale or a contract of agency. It did not evidence a conditional sale, because there was no obligation of the rubber company to transfer the title to the shoe company for an agreed price, and no obligation of the shoe company to pay an agreed price for the goods. There was no vendor or vendee named in the agreement. It was a contract of bailment for sale, not a contract of sale."

The contract under consideration in *In re Pierce,* C. C. A., Eighth Circuit, 157 Fed. 757, provided "(a) The bankrupt should receive all implements shipped and pay the freight charges thereon, and (b) store and insure them at their full value, be liable for damages thereto and keep the company harmless from all charges. (c) in case the bankrupt failed to sell all the implements received, he should either purchase and pay for those unsold at prices fixed, or hold them subject to the order of the company for a specified period, or reship or redeliver them to the company free of freight and charges. The bankrupt, not the company, had the choice of these alternatives. (d) The bankrupt agreed to sell upon terms specified, and not to deliver to purchasers before they fully settled by cash or note and to be responsible to the company for the regular price of any put out without settlement. (e) The bankrupt agreed to remit the company all cash received on sales, less commission, and to make settlement for all implements ordered under the contract upon the close of the selling season or whenever requested by the company. Provisions were made concerning credit to purchasers. (f) The bankrupt was to

guarantee the notes of purchasers. (g) The company was to sell certain of the implements specified to no other party than the bankrupt and the bankrupt was to handle no other make nor to sell outside of designated territory. (h) The implements ordered by the bankrupt were to be sold on commission for the company and should be and remain the property of the company until sold. The proceeds were also to be the property of the company. (i) The company allowed as full commission the amount realized on all sales over and above the prices specified, the commission to be the compensation for transacting the business and fulfilling the conditions imposed. The company reserved the right to rescind the contract if the bankrupt defaulted in any of his obligations", and it was held to be a contract of bailment for sale.

Franklin v. *Stoughton Wagon Co.,* C. C. A., Eighth Circuit, 168 Fed., 857, involved a contract similar to that considered in *John Deere Plow Co.* v. *M'David, supra,* and *In re Columbus Buggy Co., supra,* and provided that the agent should "pay all freight, taxes, expenses and commissions for doing the business. The Court, by Judge Riner said at p. 860:

> "The distinction between conditional sales and contracts of bailment or agency was clearly stated by Judge Sanborn of this Court in *Re Columbus Buggy Co.,* 143 Fed. 859, where the Court had under consideration a contract almost identical with the contract we are now considering.",

and further, at p. 861:

> "The contract before us is not a contract in which the consignee can sell at any price or at any terms he chooses, but contains a plain provision that the goods are at all times subject to the order of the wagon company until they are sold, and we think there is no doubt about the right of the wagon company under the contract to require the goods returned."

See also *Wood Mowing Machine Co.* v. *Van Story,* 171 Fed., 375.

In *Parlett* v. *Blake,* 188 Fed. 200, goods had been shipped to a consignee for sale under a contract which provided that the consignee should pay the expenses of insurance, storage and freight. The contract was to run to July 1, 1909, and the consignee agreed to buy and pay for all goods on hand at that time. When July 1, 1909, came, the goods on hand were sold to the consignee, but it was held that until that time he held them as agent only. The Court said, at p. 202:

> "The contracts in question were primarily contracts of agency for the sale of the consignors' goods for a period ending July 1, 1909. Goods were to be intrusted to the agent by them for sale and any that were actually sold prior to that time were the goods of the principals, and the proceeds less the commission reserved belonged to them and had to be accounted for."

On the proposition that an agreement to buy on the termination of the contract is insufficient to make a consignee a vendee prior to that time, see also *In re Reynolds,* 203 Fed., 162.

In *Childs & Co.* v. *Waterloo Wagon Co.,* 37 App. Div. (N. Y.) 242, the contract was contained in the following letter:

> "I hereby agree to act as agent for you, as such agent to receive all goods that I hereby, or may hereafter, order, and to hold all such goods, and all money and proceeds of the sale of the same, subject to your order, and in trust for you, to sell prior to the time designated by 'terms,' or as agreed, as per orders given, all goods received, and to account to you at such time for all goods so received, either in cash or satisfactory bank notes bearing interest. It being distinctly agreed that the delivery and receipt of note or notes does not, in any way, relieve me from liability as agent acting in trust for you, and to account to you for all goods and proceeds as such agent; nor shall the giving by me of any

> note be construed to give me title to said property until the same shall be fully paid. In part consideration hereof, it shall be obligatory upon me to protect the interest of Charles H. Childs & Co. in the foregoing referred to property from loss or damage by fire, exposure or otherwise. All orders subject to the approval of Charles H. Childs & Co., and when accepted cannot be canceled."

The Appellate Division of the New York Supreme Court held that goods shipped under the contract were consigned for sale and affirmed the judgment appealed from, on the opinion of the Referee, who said, at p. 247:

> "In my view of this case, the goods were consigned by a principal to its agent for sale on commission, the title remaining in the principal until the goods were sold by the agent in the usual course of business. The fact that the agent was to receive as commissions all he could obtain over a certain price at which the goods were consigned to him, instead of a percentage on sales, did not change the transaction to a sale of goods."

In *Lenz* v. *Harrison,* 148 Ill., 598, the intermediate Appellate Court made a formal finding that certain wagons were held as agent, and this was binding on the Supreme Court if really a finding of fact. It was based on a written contract, however, and was therefore reviewed. By the terms of the contract A appointed B his agent to sell wagons, and B agreed to store the wagons, pay the freight, taxes and all expenses, not to sell on credit except to people of undoubted solvency and then to take notes for twelve months or less at 7% on blanks furnished by A; to endorse all notes; to send cash at once on all cash sales; at end of each month send in statement and all notes taken; and if so required by A at the end of twelve months, to give a note for all wagons then remaining on hand, but this not to amount to a positive sale without said requirement. The goods were to be invoiced to B at agreed prices and upon settlement B to retain all excess over the agreed invoice price.

It was held that the clause requiring B to purchase remaining wagons, if standing alone, might indicate a sale, but that on the whole contract, it was really an agency agreement only. The Court said:

> "Indeed we find nothing in the contract, when all its provisions are considered, which can properly be construed in such a manner as to make the transaction a sale."

In *Holleman* v. *Bradley Fertilizer Co.*, 106 Ga. 156 the Court said at pages 158-160:

"The following is the written contract declared upon by plaintiff below in its amended petition, and which was introduced on the trial of the case * *:

> 'This agreement made this 13th day of March, 1888, between Bradley Fertilizer Company of Boston, Mass., and G. T. Holleman & Son of Lamar's Mill, Upson Co., Ga., witnesseth, that said Bradley Fertilizer Company hereby agrees to supply said G. T. Holleman & Son with a limited quantity of fertilizer for sale by them during the season of 1887 and 1888, upon following terms and conditions: The fertilizers to be delivered F. O. B. cars at Butler, Ga., viz: 12 tons Sea Fowl Guano at 26 dollars per ton 2000 lbs., which price is to be net to the Bradley Fertilizer Co., exclusive of all charges and commissions. A complete statement of the season's sales with a list of the purchaser's names in full is to be furnished said Bradley Fertilizer Co. by said G. T. Holleman & Son, not later than May 1, 1888. Settlement is to be made on or before May 1, 1888, for all said fertilizer sold to date of settlement by said G. T. Holleman & Son, by note or notes of said G. T. Holleman & Son maturing not later than November 15, 1888, and payable at Macon, Ga., without any expense whatever of remittance to said Bradley Fertilizer Company. The specific cash, checks, notes, liens, and other obligations received from time to time by said G. T. Holleman & Son in payment for or on account of said goods sold by them are to be so and held in trust for the Bradley Fertilizer

Co. and forwarded to said Company not later than May 1st, 1888, to secure the payment of note or notes of said G. T. Holleman & Son. All checks, notes, liens, and other obligations so received are to be guaranteed by said G. T. Holleman & Son, and, if returned to or left with them for collection, are, with the proceeds, to be at all times the property of the Bradley Fertilizer Company, until the note or notes of said G. T. Holleman & Son are paid in full. Said notes of G. T. Holleman & Son must be met at maturity, and their prompt payment must not depend upon the collections of the notes or accounts of the persons who have purchased said fertilizer. Said fertilizers until sold are the property of the Bradley Fertilizer Co. and any part thereof unsold on May 1st next is to be subject to their order, but the said G. T. Holleman & Son hereby agree to keep them well sheltered and to hold the same free of all charges and storages.' * * *

1. In several of the grounds of the motion for a new trial, error is assigned on the construction of the above contract given by the judge in his charge to the jury. On this point the court charged the jury that the contract meant that Holleman & Son were the agents of the Bradley Fertilizer Company; that the contract constituted Holleman & Son agents of the company to sell a certain specific amount of guano at a certain specified price, and that, under and by virtue of the terms of that contract, title never passed out of the Bradley Fertilizer Company until it was disposed of by their agents to the consumers. Counsel for plaintiffs in error contend that this was an erroneous construction of the contract; that the stipulations entered into between the parties constituted Holleman & Son purchasers of the goods from the company, and that, therefore, when the goods were delivered to them, title passed out of the company and vested in them. We think the court was right in its ruling upon the subject. Manifestly, under the terms of the contract, Holleman & Son were under no obligation to the company, and had incurred no liability, until they had made sale of the goods to third parties; and, until this sale was made, the title to the property remained in the company. If there

were any doubt about what the real intention of the parties was under the terms of the contract down to the last sentence, that sentence clearly removed all ambiguity in stipulating that 'Said fertilizers until sold are the property of the Bradley Fertilizer Company, and any part thereof unsold on May 1st next is to be subject to their order.' "

In *Milburn Mfg. Co.* v. *Peak,* 89 Texas, 209, the question was whether a certain contract was "one of consignment merely, or one of sale." The court said at p. 210:

"The contract referred to in the above certificate is in substance as follows:

'This agreement between Milburn Mfg. Co., party of first part, and Hood & Co., party of the second part, witnesseth: (1) That first party agrees to manufacture and ship to second party the following described vehicles to be sold and accounted for to first party in cash or purchaser's note, as herein described, at the prices herein stated (here follows detailed description of vehicles and prices). All notes to be on blanks furnished by first party, second party to see that the blanks therein retaining a mortgage on articles sold are properly filled out and that a mortgage is thereby created, and second 'party shall have no authority to take notes not in accordance with this provision'; (2) that second party agrees to receive, store, pay freight, and keep under cover and good condition, and fully insure at their own expense, in the name and for the benefit of first party all vehicles sent, until sold by second party or ordered away by first party as herein provided, to pay all taxes on all vehicles, to make all reasonable efforts to sell same, to settle for all vehicles sold, to make all sales and take all evidence of indebtedness therefor for and in the name of first party, to remit the cash and notes received for said vehicles to first party. All notes so transferred to be endorsed and guaranteed by second party, who agrees to take up and pay cash for all such notes as should not be paid in sixty days after maturity; second party to make no charge against first party for selling, storing or handling

the vehicles, their sole commission and compensation for doing such business to be the margin or difference between the price herein stated and the prices at which said vehicles shall be sold, to be ascertained and received by first party. Second party agrees to sell all the vehicles under this contract within twelve months and in case of failure or neglect to do so 'to settle for those remaining unsold in the following manner, to-wit: At the option of first party to either give their note due in three months with ten per cent interest, payable to first party or order, or to pay cash for them at the end of three months, or to store said vehicles in good order free of charge subject to the order of first party; (3) that the ownership of all vehicles furnished under this contract or their proceeds shall remain in first party until settlements shall have been made for them by second party as herein provided, and that the money and effects received in the course of the business of this agency shall in no case or under any circumstances be appropriated to the use of the second party until such settlement is made and the compensation or commission of second party has been ascertained and set apart by first party; (4) This agreement hereby made revocable at the pleasure of first party, which reserves the right to withdraw any of the above jobs at any time; (5) This contract only applies to above goods now on hand at Fort Worth, Texas.'

The contract is quite voluminous, but we think the above is the substance of its stipulations.

A factor is one to whom goods are sent for sale on commission; the relationship between him and the consignor is that of principal and agent, the general property in the goods remaining in the consignor. If he undertakes to guarantee the payment of the debts arising through his agency, he is said to sell on a *del credere* commission. * * * At all events it is clear that his contract of guaranty is not at all inconsistent with his being a factor. * * *''

And in concluding the opinion, on page 212, the court said:

"We are therefore of opinion that Hood & Co. were merely the factors of appellants and that the instrument should be construed to be a contract of consignment and not one of sale."

In *Monitor Mfg. Co.* v. *Jones*, 96 Wis. 619, the following contract was considered:

"Monitor Manufacturing Co. * * and J. A. North & Sons, * * agree and contract, to-wit: Said company hereby appoints said J. A. North & Sons as its agent or agents for the sale, on commission, of its machines, until all goods shipped under terms of this contract are sold or turned over to Monitor Manufacturing Co., which shall be done on the latter's order.

Said J. A. North & Sons accept the agency, and agree to the conditions of this contract. Said agent or agents are to solicit for orders thoroughly in the following described territory, and in such territory only:

Fox Lake and vicinity.

Monitor Manufacturing Co. agree to furnish said agency with machines as follows, and as ordered up to October 1st, 1895, the commission to consist of amount received above the following net prices. * *

Said agent or agents desire goods ordered above to be shipped on or about Feb. 1st, 1895, *on terms, one-half six months, balance eighteen months, in farmers' notes, with legal rate of interest if paid at maturity; if not so paid, interest at highest legal contract rate from April 1, next, on spring sales, and Sept. 1, next, on fall sales. Final and complete settlement for all spring sales shall be made on or before May 1, next, and for all fall sales on or before Oct. 1, next. For notes maturing first fall, or in six months, in excess of same amount due second fall, or eighteen months, acceptable to Monitor Manufacturing Co. in settlement, a discount of five per cent. will be allowed. Cash discount ten per cent. up to July 1, 1895.*

All machines and their proceeds shall remain the property of the Monitor Manufacturing Co. until so settled and paid for.

Retail prices to be governed by Monitor Manufacturing Co.'s printed blank orders. On each sale one of said orders to be filled out with a true property statement, and times of payment.

Sales to be made to good and responsible parties only. All notes to be drawn to the order of Monitor Manufacturing Co. Said agent or agents agree to render at time of settlement, to Monitor Manufacturing Co., a true statement of all sales, and to have on hand the entire proceeds of each and every sale, and to deliver to Monitor Manufacturing Co. or its authorized agent, such complete proceeds, from which said company shall pay said agent or agents the commission due on sales, such payment to be pro rata in cash or notes in proportion of the commission to the net prices above given. Sales made by trade, other property than notes being received, shall be considered same as cash sales. In case notes tendered to Monitor Manufacturing Co. as proceeds of sale, do not each contain a true property statement of at least $1,000. over and above all indebtedness and exemptions, or, in lieu of this statement, are not each secured by first mortgage, duly executed and recorded, on property of $300 market value, said company shall not be bound to accept such notes, but the agent or agents hereby agree to accept them to apply on his or their commissions. However, be it understood that in no case shall the represented value of notes not complying with the conditions of this contract exceed agent's commission.

On any sale or sales made by said agent or agents under this contract that prove a partial or total loss by reason of the uncollectibility of notes, said agent or agents agree to pay to Monitor Manufacturing Co. fifty per cent. of the loss on such notes, payment to be made either in cash or notes acceptable to Monitor Manufacturing Co., whenever said company transfer to the agent or agents the claim or claims on which settlement by virtue of this agreement is demanded.

Said agent or agents agree to receive and pay freight on all machines shipped, taxes, insurance, and all damages sustained to the machines by their

not being properly housed, on all machines carried that he or they may have ordered. If Monitor Manufacturing Co. relieve said agent or agents of any machines, said agent or agents agree to put machines aboard cars free of charge and will also pay at settlement as much as the difference between place of reshipment to the point shipped, so as to make it equal to freight from factory.

Said agent or agents to sell the machines subject to the regular warranty furnished, and not to engage in the sale of other machines of the same kind during the term of this contract. Monitor Manufacturing Co. agree to use its best efforts to ship all machines ordered, but shall not be held responsible to said agent or agents in case the demand exceed the supply.

At the request of Monitor Manufacturing Co. complete returns of all machines delivered on this contract shall IMMEDIATELY be sent to said Company.

A commission of twenty per cent. allowed on the sale of repairs, excepting rubber grain-drill tubes, which are furnished on net cash terms. All repairs to be settled for in cash.

All 12 Bar P. F. seeders sold net cash July 1, 1895, $31.00 each.

Freight equal to Beaver Dam.

Notes in our favor turned over to agents as commission must be sent to our office for indorsement. Our road representatives have no authority to indorse notes in our name.

The court said at pages 623-624:

"The defendant's contention is that the contracts under which the implements were placed in the hands of North & Sons were in fact contracts of conditional sale of the machines, and hence void as to all persons save the parties and those having actual notice thereof, because they were never filed in the office of the town or village clerk, as required by sec. 2317, R. S. This is the only substantial contention made, and, if it fails, the judgment must be affirmed.

Careful perusal of the contracts convinces us that they were commission contracts in legal effect, and not contracts of conditional sale. The contracts are

quite similar in their terms to the contract which was under consideration in Williams M. & R. Co. *v.* Raynor, 38 Wis. 119, and which was held to be an agency or commission contract; and much that is there said applies with equal force to this case. The controlling question undoubtedly is whether the contract provides for consignments of goods to be settled for at fixed prices out of the proceeds of the goods when sold, or whether, under the terms of the contract, the alleged consignee is in fact a purchaser, and becomes liable for the goods, when sold, as a principal debtor; and these questions are to be determined not so much by the words used as by the evident intent and legal effect of the provisions. Scrutinizing the various provisions as carefully as possible, we conclude that the contract before us calls for consignments of goods to be settled for out of the proceeds of sales, and does not make the consignees purchasers of the goods."

Weir Plow Company v. *Porter,* 82 Mo., 23, involved the construction of a contract, which the court summarized as follows:

"That the Weir Plow Company agrees to manufacture and furnish to the party of the second part, aboard the cars at Monmouth, Ill., on or before the 20th day of February, 1876, twenty-four wood beam cultivators, etc. Party of the first part further agrees to sell the above named implements to no other than the party of the second part, during the year 1876, in the following territory, viz: Putnam county, Missouri. The party of the first part further agrees to pay the party of the second part $6.40 for selling each wood or iron beam cultivator, etc. Provided, each implement is sold at respective list prices before mentioned. All notes taken for the sale of the above implements to be made payable to Weir Plow Company, or order, bearing interest, from June 1st, 1876, or from date, at the rate of ten per cent. * * * And provided further, that the party of the second part take no notes without their being signed by a resident land owner, or good and sufficient security, and guarantee their payment by

indorsing them, waiving demand, notice of protest and non-payment. * * * Said party of the second part agrees to sell the aforesaid number of implements as above stipulated, to keep all moneys and notes separate and apart from individual or company business, and to remit cash due each month for each implement sold for cash, to Weir Plow Company, at Monmouth, Illinois, and be ready to settle with the party of the first part by the 1st of July next, or at any time thereafter, when the party of the first part or their authorized agent may call upon the said party of the second part.

* * * The said party of the second part (Harper) agrees to represent each implement sold for cash, by the cash, at wholesale price, and each implement sold for note by note, at retail price, and indorsed as above stipulated, such notes as the party of the first part may designate sufficient in amount to pay for all implements not paid for cash, counting $22.75 for each wood beam cultivator, etc. The said party of the second part further agrees that should he neglect or fail to sell all of said implements by the 1st day of July, 1876, to settle for those remaining on hand by giving his note, payable to the Weir Plow Company, or order, due November 1st, 1876, or indorse and turn over farmers' notes as provided for payment of implements sold on time, as the party of the first part may elect; said notes to bear interest at ten per cent from maturity, or, if the party of the first part should so elect, to store and keep well housed, free of charge, implements unsold, subject to the order of the party of the first part.

The party of the first part reserves the right to revoke this agency and take possession of said implements and the proceeds of those sold, at any time the said party of the second part fails to discharge his duties as agent."

In holding this to be a contract of bailment only, the Court said at pages 29-30:

"It is true that the plaintiff, according to the terms of the instrument, agreed to manufacture and furnish to Mr. Harper the implements covered by it, and not to sell them to any one else in Putnam

county. This language of itself could not constitute a sale to Harper, in the absence of appropriate subsequent provisions to that effect. Now it happens, that all the subsequent provisions negative the inference of a sale to Harper, and constitute him a bailee or agent for the purpose of selling the implements to others, and accounting for the proceeds upon a commission at a fixed sum for every implement sold by him. * * * The whole bailment or agency is subject to revocation upon failure of said Harper to discharge his duties as agent. I am unable to perceive how Mr. Harper, or his partner, can claim any right of property in the implements as against the company, under this contract and the evidence in the record. According to the obvious intent of the contract, the unsold implements did not vest in Harper and his partner unless the company should choose to make them vendees upon their offering their paper for the price thereof, and should not choose to order the implements on storage for the future disposition of the company.

Under the evidence the agents did not furnish their notes for the unsold implements, nor were they, or anything equivalent thereto, accepted by the company in consideration for a sale of them. On the contrary the property unsold was retained on storage for the company; and the assignee of the agents neither had or made any claim for it, as passing to him under a general assignment, which could legally pass nothing belonging to the company. There was not even a conditional sale of the unsold implements, because there was no condition within the possible power of Harper to perform which would give him the title. Any title to be acquired by him depended upon the election of the vendor whether it would make him a vendee, by accepting his paper for the purchase money, or decline doing this and order the goods to be retained on storage for the use of the company."

In *National Cordage Company* v. *Sims,* 44 Neb. 148, the court said at page 153:

"The law implies a mere consignment of goods for sale upon a *del credere* commission, and not a sale

thereof where the contract provides that the consignee shall receive them and return periodically to the consignor the proceeds of sales at prices charged by the latter, the consignee guarantying payment therefor."

In *The Williams Mower & Reaper Co.* v. *Raynor*, 38 Wis. 119, the following contract was considered:

"ARTICLES OF AGREEMENT for the season of 1874, entered into this 31st day of January, 1874, by and between the WILLIAMS MOWER & REAPER COMPANY, of the city of Syracuse, state of New York, as the first party, and W. C. RAYNOR, of the city of Milwaukee, state of Wisconsin, as the second party—WITNESSETH:

1st. The second party hereby agrees to act as agent of the first party, for the sale of 'The Williams Changeable Speed Combined Selfraking Reaper and Mower', 'The Williams Dropper', and 'The Williams Single Mower,' in the following territory: * * * and to guaranty the sale for the harvest of 1874, in the territory named above, of at least thirty-six of said Combined Selfrakers No. 1, and forty-eight of the No. 2,—of said Droppers No. 1,—Nos. 2 and 5; three Droppers and five of said Single Mowers to be hereafter shipped him by the first party, as per his shipping directions.

2d. Also to thoroughly canvass said territory, and order from time to time such further number of machines as he shall find sales for, guarantying the sale of all machines so ordered; the first party to fill the orders so far as their supply will allow; and any of the machines so ordered remaining on hand unsold at the close of the harvest, to be settled for by note of the second party, due December 1, 1875, or a continuation of this contract until the same are disposed of and paid for, at the option of the first party—in either case to draw interest at ten per cent. per annum from July 1, 1874, instead of farmers' notes, as hereinafter provided.

3d. The second party agrees to keep properly stored under cover all machines in his care, and pay all freight and charges on the same.

4th. The second party agrees to give special assistance either in person or by competent agent, to each purchaser, to set up and start the machine, and will not deliver a machine until fully settled for.

5th. The second party guaranties that all the Combined Selfrakers shall net as follows: No. 1, one hundred and seventy dollars; No. 2, one hundred and fifty five dollars; Droppers No. 1, one hundred and fifty dollars; No. 2, one hundred and thirty-five dollars each, to the first party at their works in Syracuse, New York, in creditable farmers' notes, taken for said machines, to be due and payable at least one-half on or before December 1, 1874, and not exceeding one-half December 1, 1875, with interest at ten per cent. per annum, from July 1, 1874, and the Single Mowers eighty-five dollars each, to the first party at their works in Syracuse, New York, in creditable farmers' notes and pro rata cash, taken for said machines, to be due and payable on or before December 1, 1874, with interest at ten per cent. per annum from July 1, 1874; and on all machines sold and paid for in cash on or before October 1, 1874, and promptly remitted for as received, the first party is to allow a discount of ten dollars on each Selfraker or Dropper, and five dollars on each Single Mower so sold and remitted for. In every sale where notes are taken, the blank forms furnished by the first party to be used, payable to their order, fully filled out, and to guaranty the collection of each of said notes.

6th. The second party agrees to collect notes when returned to him for that purpose, and to obtain security for the same, if required by the first party, at his own expense.

8th. The second party agrees to receive and pay freight on all extra parts ordered by him, to keep them under cover, to sell the same for cash only, and is to be paid by the first party out of the proceeds of extra parts sold and paid for, 35 per cent.

9th. The second party agrees to keep a true and accurate account of all transactions pertaining to the business of the first party; will in no case allow the same to be mixed up with his other business; and will at any time and all times when required by first party, exhibit said accounts for inspection.

10th. The first party warrant their machines to be well made, of good material and well finished, to mow, reap and deliver the grain as well as any machine made for the same purpose.

11th. The second party agrees to render a full statement on blank forms furnished by first party, of all sales of machines and extra parts, on or before the first day of October, 1874, with full payment of any balance that may remain due to the first party, in proportion of cash and notes therein agreed. * * *

It is understood if this contract is carried out fully and faithfully on the part of W. C. Raynor, a reduction of five dollars is to be made upon each machine at the time of settlement.

For exceptional cases, when necessary to make a sale, seven per cent. interest will be allowed, instead of ten, as named in the contract. * * *''

The court held that the contract created an agency for sale only, and said at pages 128-131:

"After very careful consideration of all the provisions of the contract under consideration, we have reached the conclusion that the defendant was the agent or factor of the plaintiff to sell the machines, and that the title thereto did not vest in the defendant. In other words, we conclude that the defendant held the machines, and the proceeds of the sales thereof, in a fiduciary capacity; and, the motion papers showing that he had converted or fraudulently misapplied the same, the order of arrest was properly made. * * *

We are unable to construe a contract containing the above provisions, to be a contract of sale. It does not profess to be a contract of sale; on the contrary, by its express terms, the defendant agrees to act as agent of the plaintiff for the sale of the machines within certain specified territory. The restriction of the defendant as to the length of credit he might give, and, what is perhaps more significant, the provisions that the proceeds of sales, to the extent of the stipulated prices, whether cash or notes, should be paid and delivered over to the plaintiff and that each purchaser on credit should be required to give his note payable to the order of the plaintiff,

and to covenant that the title to the machine so purchased should *remain* in the plaintiff until paid for, all strongly, almost unmistakably, indicate that an agency or bailment to sell, and not a sale, was intended by the parties. To the same effect is the provision by which the defendant guarantied the sale of all machines ordered by him. If he was the absolute purchaser and owner of all machines delivered to him under the contract, the reason for inserting this provision is not apparent.

The construction we give to this contract is strengthened by the provisions in the second paragraph relating to machines not sold during the season of 1874. At its option the plaintiff could have required the defendant to give his note for the stipulated price of the unsold machines, or could have allower them to lie over in his hands until the next season, subject to the same contract. This, we think, was an option to compel the defendant to purchase such machines absolutely, or to retain them as an agent or bailee to sell. The provision seems inconsistent with the theory that the title thereto passed to the defendant in the first instance. * * * *.

It is also claimed that the provision which requires the defendant to guaranty the collection of all notes taken for machines, is an indication that a sale, and not a bailment, was intended by the parties. But this is merely what is known as a *del credere* agreement, quite usual between principals and factors, and which in no manner affects the title of the property to which it relates, or the fiduciary relation of the factor to his principal. * * * we think * * that it is a contract by which the defendant agreed to act as agent in certain counties, and under certain restrictions, to sell machines for the plaintiff, and to pay over to the plaintiff the money and notes received by him on such sales, to the stipulated amount, the plaintiff remaining the owner of the property until sold by the defendant. * * * *"

See also:

Sturtevant Co. v. *Dugan & Co.*, 106 Md., 587;
Balderston v. *Natl. Rubber Co.*, 18 R. I., 338;

Nutter v. *Wheeler,* 2 Lowell, 346 and 18 Fed. Cas., p. 497;
National Bank of Augusta v. *Goodyear,* 90 Ga., 711;
Eldridge v. *Benson and Trustees,* 61 Mass., 483;
Cortland Wagon Co. v. *Sharvy,* 52 Minn., 216;
Donnelly v. *Mitchell,* 119 Iowa, 432;
Lance v. *Butler,* 135 N. C., 419;
Norton & Co. v. *Melick,* 97 Iowa, 564;
Harris v. *Coe,* 71 Conn., 157;
Fleet v. *Hertz,* 201 Ill., 594;
Furst v. *Commercial Bank,* 117 Ga., 472;
Blood v. *Palmer,* 11 Me., 414;
Snook v. *Davis,* 6 Mich., 155;
St. Paul Harvester Co. v. *Nicolin,* 36 Minn., 232.

In *Sturm* v. *Boker,* 150 U. S., 312, a contract was considered, under which goods were consigned to be sold by the consignee "to the best advantage," the profits to be equally divided and the goods to be shipped "free of any expense" to the consignor and if not sold, returned "free of all charges." The goods consigned were insured by the consignee. The Court, by Mr. Justice Jackson, said at p. 326:

> "It is too clear for discussion or the citation of authorities, that the contract was not a *sale* of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words 'consign' and 'consigned' employed in the letters were used in their commercial sense, which meant that the property was committed or entrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other.",

and further, at pp. 328 and 329:

> "Was the contract, as claimed by counsel for the defendants, a contract of 'sale or return?' We

think not. The class of contracts, known as contracts of 'sale or return,' exist where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchaser to retain or return. In this class of cases the title passes to the purchaser subject to his option to return the property within a time specified, or a reasonable time, and if, before the expiration of such time, or the exercise of the option given, the property is destroyed, even by inevitable accident, the buyer is responsible for the price.

"The true distinction is pointed out by Wells, J., in *Hunt* v. *Wyman,* 100 Mass., 198, 200, as follows: 'An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return.'"

* * *

"The contract in its terms and conditions meets all the requirements of a bailment. The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale. This distinction or test of a bailment is recognized by this court in the case of *Powder Co.* v. *Burkhardt,* 97 U. S., 110, 116.

The agency to sell and return the proceeds, or the specific goods if not sold, stands upon precisely the same footing, and does not involve a change of title."

* * *

"The complainant's common law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and

> render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking,''

In *Ludvigh* v. *American Woolen Co.,* 231 U. S., 522, a contract under which the Woolen Company consigned goods to the so-called Niagara Company was considered. It provided that the Niagara Company should hold and care for the goods shipped to it, sell them for the Woolen Company, and remit to that Company the amount collected, ''minus, however, the difference between the price'' for which it had been invoiced to the Niagara Company and the price at which it had been sold by it. The property was to be insured by the Niagara Company for the benefit of the Woolen Company. The contract further provided that the Niagara Company ''does hereby guarantee the payment of all bills and accounts for merchandise, possession of which is delivered to it under this agreement'', and if the bills were not paid the Niagara Company agreed ''to pay . . . the invoice price of said merchandise'' and acquire the ''title to said merchandise, or to the proceeds thereof''. The last paragraph of the contract provided as follows: ''This agreement shall continue for one year. If, for any reason, this agreement terminates, all of the merchandise, possession of which is held by the party of the second part under this agreement, shall at said termination be immediately returned to the possession of the party of the first part.'' It was held that the contract was one of bailment for sale. The Court, by Mr. Justice Day, said at p. 528:

> ''The entire contract must be read to ascertain the purpose of the parties, and we find in clause eight, limiting the agreement to one year, the provision that if for any reason the agreement terminated all of the merchandise, the possession of which was held by the Niagara Company under the agreement, should be immediately returned to the Woolen Company. The District Court held that this agreement,

sections four and five, obligated the Niagara Company to pay for each and every piece of goods delivered under the contract with it, but for the reasons we have stated we cannot agree with this construction. We find that the agreement was really one of bailment for the purpose of sale, with the right to return the unsold goods. There is nothing illegal in such contracts when made in good faith. As this court held in *Sturm* v. *Boker,* 150 U. S., 312, 330, an agency to sell and return the proceeds or the specific goods stands upon the same footing as a bailment where the identical article is to be returned in the same or altered form and title to the property is not changed."

I.—In 1., *Clark & Skyles,* on the Law of Agency, the difference between contracts of sale and agency contracts is well stated, at p. 16, as follows:

> "The question is: Did the consignor intend to sell the goods to the consignee, and the consignee intend to buy them himself, or did the parties intend that the consignee should take possession of the goods merely as the agent of the consignor, and sell them on his account?",

and further, commencing at p. 18:

> "When the business undertaken by one party, with respect to handling and selling goods. is solely for the interest and benefit of the other, the original owner, as where it is agreed that one party shall buy and ship goods for the sole account of another, the relation is clearly that of principal and agent. Among other features which have been held to be repugnant to the idea of an absolute sale, and to show the existence of the relation of principal and agent, are, the retention of the title and the right to possession of the goods by the consignor or original possessor; the reservation by the consignor of the right to have the goods which may remain unsold returned to him, or a reservation by the consignee of the corresponding right to return the goods remaining unsold, or to purchase them outright; stipulations or provisions for the payment by the consignor to the consignee of

percentages and commissions on sales made, which are of such a character as to negative the idea that such sales were made for the direct benefit of the consignee; requirements that the goods shall be sold at prices fixed by the consignor, and that settlements shall be made on that basis; provisions that payment for the goods sold shall be guaranteed by the consignee; provisions limiting the time within which the goods shall be sold, or the credit which shall be extended to purchasers, or prescribing the mode of payment, whether in cash, or by evidences of debt, requiring the making of contracts or the taking of notes in the name of the consignor; requirements that the consignee shall keep the goods safely or keep them covered by insurance; or any other stipulations or conditions which the consignee is bound to observe, and which indicate that the consignor did not intend to transfer the property in the goods to the consignee or relinquish control of them.

It is perhaps unusual, but it is not incompatible with the notion of an agency, that the compensation of an agent to sell goods shall be the difference between the amount of purchase money received by him for goods sold and the price fixed by the principal, or that he shall have for his services all money received by him in excess of the invoice price. He may as well be compensated in this way as by the allowance of a commission upon the gross proceeds.

The breach of a contract to sell goods, and account for the same within a specified time and at fixed prices, will not convert a contract of bailment and agency into a contract of sale."

The Referee's Opinion.

In his certificate to the District Court (pp. 45 to 47) the Referee, after setting forth the proceedings, expressed his opinion of the agreement, and referring first to the point that the Andrus Company kept the Appellant's lamps "separate and apart from the other goods in the house," said: "It does not appear that there was any greater degree of separation" between them and other stock "than would naturally be the case with

any other special line of goods'' (p. 45). It was, of course, quite sufficient if the lamps were kept in such a way that they could be identified and taken at any time, and it is expressly agreed in the stipulation that ''they were kept together on shelves in one place for sale, and in boxes'' specially marked for identification (p. 34). What possible further separation the Referee may have had in mind does not appear.

The Referee then said at page 45: ''The said contract purports to be one of agency and while it provides for the return of any unsold stock at any termination of the contract, whether it terminates by its own terms or from some act of the parties, yet it seems to me that its evident purpose was to enable the manufacturer to control the output of his mills and the disposition of his products, and that when his goods are put in the hands of his so-called agents for sale, that the sale is absolute so far as creditors are concerned, and that upon the termination of an agency as between the agent and the manufacturer, he could require the return of the unsold goods in accordance with his scheme of protecting and controlling his sales. The effect of this contract is to give the agent 60 days' credit, and ten days' further time in which to report sale of the goods actually disposed of, but there is nothing in the contract to prevent the said agent paying for all of the goods upon their receipt, but at the expiration of the 60 days plus 10 days the payment would constitute a sale of the goods and pass the title from the manufacturer.''

This is a direct contradiction of the express terms of the agreement and is difficult to understand. It is certainly clear that the failure to provide that the agent shall *not* buy is no evidence that he has agreed to buy or has a right to buy. The Referee says that goods delivered to the agent are sold, so far as creditors are concerned, yet there is no obligation upon anyone to pay for them until they have been actually sold by the agent to third parties. When the goods reach the agent's

hands his duty is to take care of them, to sell them if he can, and in the meantime to hold them subject to the orders of the owner. His guarantee of sales, which makes him a *del credere* factor, is enforceable only when sales have been made, and it is the only promise to pay that the agent has made.

The Referee further said that the knowledge of Ackroyd (the person who acted for the General Electric Company in delivering lamps) of the fact that the Andrus Company was in financial difficulties was sufficient to apprise the General Electric Company "of the inability of the bankrupt to meet its obligations," and then noted that it "took no steps to terminate the contract" (p. 46). The significance of this as indicating that the General Electric Company retained title has been considered under B., *supra.*

In concluding his opinion the Referee said, at page 47: "I think this case is similar to the case, *In re Graves & Labelle,* No. 5030, decided by the Honorable Edward E. Cushman about June 27, 1913", and then said further that he "therefore sustained" the position of the trustee. This was on October 18, 1913, and in the following month, on November 25, 1913, the decision to which he referred was reversed by this Court (*Berry Bros.* v. *Snowdon* and *In re Graves,* 209 Fed., 336). In that case certain goods had been consigned for sale, under a contract somewhat similar to the contract involved in the case at bar, and the consignee subsequently became bankrupt. The consignor filed a petition against the trustee in bankruptcy, which was denied by the District Court upon the ground that the contract contemplated a conditional sale and was not recorded under the Washington statute. The decision was reversed by this Court upon the ground that the transaction "was not a sale of any kind" but was "clearly one of bailment." The principle involved in this decision governs the case at bar and requires that the order appealed from be reversed. It is true that in that case the consignor paid the "freight,

cartage, storage and insurance and that in the case at bar such expenses were paid by the consignee. That difference, however, is immaterial, as such an undertaking on the part of a factor is a perfectly lawful agreement which can be and is constantly made without in any way changing the relation of the parties, as clearly appears from the authorities already considered.

The conclusion reached by the Referee is not sustained by his reasoning and the authority upon which he relied no longer exists. The District Judge wrote no opinion.

POINT V.

The order appealed from should be reversed, with costs to the appellant.

Respectfully submitted,

FRANK H. KELLEY,
RALPH WOODS,
Attorneys for Appellant.

CHARLES NEAVE,
JOHN M. GEARIN,
EDWARDS H. CHILDS,
Of Counsel.